**Western New England Law Review**

Volume 13 *13 (1991)*
Issue 2

Article 3

1-1-1991

# CIVIL PROCEDURE—IN FORMA PAUPERIS EMPLOYMENT DISCRIMINATION PLAINTIFFS AND THE FEDERAL GOVERNMENT: ESCAPING THE 15(c) TRAP

Sandra L. Cordes-Vaughn

# CIVIL PROCEDURE—IN FORMA PAUPERIS EMPLOYMENT DISCRIMINATION PLAINTIFFS AND THE FEDERAL GOVERNMENT: ESCAPING THE 15(c) TRAP

## INTRODUCTION

An individual alleging employment discrimination against the federal government is faced with an extremely short limitations period when attempting to obtain relief by filing a civil action.[1] Title VII of the Civil Rights Act of 1964 establishes a thirty-day time limit in which an action must be filed and requires that the proper defendant in such a suit be the "head of the department, agency, or unit, as appropriate."[2] The short limitations period, combined with the necessity for specificity in naming the appropriate defendant, presents particular peril to the person who is proceeding pro se and in forma pauperis.[3] A pro se plaintiff is often not aware that the head of the agency must be the named defendant and errs by naming the agency or department itself.[4] Once the plaintiff learns of the error, he or she will attempt to amend the complaint to correct the name of the defendant in an effort to continue the suit.[5] If the amendment is attempted after the expiration of the thirty-day limitations period, courts are required to apply the relation back provisions of Federal Rule of Civil Procedure 15(c).[6] The amendment will be allowed to relate back to the original filing date if it meets the four-pronged test developed by the United States Supreme Court in *Schiavone v. Fortune*.[7] The "linchpin" of relation back is notice.[8] Notice of the suit must have been received before the

---

1. *See* Title VII of The Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(c) (1988).

2. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1988)).

3. *See, e.g.*, Johnson v. United States Postal Serv., 861 F.2d 1475 (10th Cir. 1988), *cert. denied*, 110 S. Ct. 54 (1989).

4. *See, e.g.*, Warren v. Department of Army, 867 F.2d 1156, 1157-58 (8th Cir. 1989); *Johnson*, 861 F.2d at 1476; Paulk v. Department of Air Force, 830 F.2d 79, 80 (7th Cir. 1987).

5. *Warren*, 867 F.2d 1156; *Johnson*, 861 F.2d 1475; *Paulk*, 830 F.2d 79.

6. *See* Schiavone v. Fortune, 477 U.S. 21, 22 (1986). For the text of Rule 15(c), see *infra* note 48.

7. 477 U.S. 21 (1986). For the text of the four-prong test, see *infra* text accompanying note 67.

8. *Schiavone*, 477 U.S. at 31.

limitations period has expired.[9]

Since the *Schiavone* decision, the United States courts of appeals have developed differing approaches regarding the application of Rule 15(c) to amended complaints filed by employment discrimination plaintiffs proceeding in forma pauperis against the federal government.[10] A principal issue in these cases has been whether the statutory limitations period will be tolled or held in abeyance when the plaintiff attempts to correct the name of the defendant after the expiration of the period.[11] The doctrine of tolling is a judicially-created exception to statutory limitations periods based upon equity. The use of equitable tolling often conflicts with the purpose of statutes of limitations, which are designed to protect defendants from stale claims even though these claims may be just.[12] Accordingly, the judiciary is hesitant to toll a statutory limitations period and substitute its view for that of the legislature. Nonetheless, due to a wide degree of judicial discretion, the courts still use tolling where "the interests of justice require vindication of the plaintiff's rights."[13]

Application of equitable tolling in this area is further complicated by the provisions of the federal in forma pauperis statute which requires that the district court and the United States Marshal's Service effect all service.[14] This requirement forces the plaintiff to rely on the court to properly and promptly complete service.

This Comment will discuss the interaction between Title VII,[15] the in forma pauperis statute,[16] the relation back provisions of Federal Rule of Civil Procedure 15(c),[17] and the doctrine of equitable tolling. This Comment will address how this interaction may result in a litigation "trap"[18] for the Title VII, in forma pauperis plaintiff proceeding

---

9. *Id.* (citing 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1489, at 250 (Supp. 1986)).

10. Soto v. United States Postal Serv., 905 F.2d 537 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 679 (1991); Warren v. Department of Army, 867 F.2d 1156 (8th Cir. 1989); Johnson v. United States Postal Serv., 861 F.2d 1475 (10th Cir. 1988), *cert. denied*, 110 S. Ct. 54 (1989); Mondy v. Secretary of Army, 845 F.2d 1051 (D.C. Cir. 1988); Paulk v. Department of Air Force, 830 F.2d 79 (7th Cir. 1987).

11. *See* cases cited *supra* note 10.

12. Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944).

13. Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965).

14. 28 U.S.C. § 1915(c) (1988).

15. 42 U.S.C. §§ 2000e-5 to -16 (1988).

16. 28 U.S.C. § 1915 (1988).

17. FED. R. CIV. P. 15(c).

18. *See* Gonzales v. Secretary of Air Force, 824 F.2d 392, 396 (5th Cir. 1987) (Brown, J., dissenting) ("The majority's characterization of § 2000e-16(c) and Rule 15(c) as traps to frustrate a citizen in his quest to vindicate his civil right is contrary to the spirit

against the federal government. As background, Section I of this Comment will outline the applicable requirements of Title VII and the in forma pauperis statute. Section I will also discuss the decision in *Schiavone v. Fortune*,[19] and the standards for relation back under Rule 15(c).

Section II presents decisions of the United States courts of appeals regarding equitable tolling as it relates to the Title VII, in forma pauperis plaintiff. Section III discusses the general concept of the doctrine of equitable tolling and presents an outline for application of the doctrine. Section III then reviews the decisions of the courts of appeals in light of this analytic framework.

Section IV critiques the use of equitable tolling as a means of allowing relation back of amended pleadings in Title VII cases. Section IV then proposes options which would lessen the need of a Title VII, in forma pauperis plaintiff to resort to the doctrine of equitable tolling as a means of escaping the Rule 15(c) trap.

## I. BACKGROUND

### A. *Title VII Procedural Requirements for Civil Suit*

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination by the federal government on the basis of race, color, religion, sex or national origin.[20] To pursue a discrimination claim, an aggrieved individual must first pursue available administrative remedies.[21] If such remedies prove unsuccessful, an individual may bring a

---

of our civil rights laws and the aspirations of the drafters of the Federal Rules of Civil Procedure."), *cert. denied*, 485 U.S. 969 (1988); 6A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1502, at 167 (1990) ("The 1966 amendment [to Rule 15(c)] should have the desirable effect of facilitating a citizen's suit against his sovereign by eliminating an unnecessary trap for the unwary.").

19. 477 U.S. 21 (1986).

20. Title VII of the Civil Rights Act of 1964 § 717(a) (codified as amended at 42 U.S.C. § 2000e-16(a) (1988)). The federal government includes the United States Postal Service. *Id.* The Rehabilitation Act of 1973 similarly prohibits discrimination based on physical handicap. The Rehabilitation Act of 1973, Pub. L. No. 93-112, § 501, 87 Stat. 355, 390 (codified as amended at 29 U.S.C. § 791 (1988)).

21. 42 U.S.C. § 2000e-16(c) (1988). The Equal Employment Opportunity Commission ("EEOC") is charged by Congress with the general administration of Title VII. *Id.* § 2000e-4, -5. Regulations promulgated by the EEOC require federal employees alleging prohibited employment discrimination to first pursue processing of their complaint through the internal procedures of their own agency or department. 29 C.F.R. § 1613.214 (1990). After final disposition by the agency, the employee may pursue the claim to the EEOC or to federal court. 42 U.S.C. § 2000e-16(c) (1988). For a general discussion of administrative remedies under Title VII, see L. MODJESKA, EMPLOYMENT DISCRIMINATION LAW § 2.7, at 216-26 (2d ed. 1988).

civil action against the offending federal agency or department within thirty days after receipt of a notice of final administrative action.[22] Receipt of this notice, known as a right-to-sue letter,[23] begins the thirty-day period for filing suit.[24]

If an individual decides to sue, he or she must commence the action by filing a complaint with the appropriate federal district court.[25] To satisfy the statute of limitations period, the complaint must be filed with the court before the expiration of the thirty-day period.[26] For any subsequent amended pleadings to relate back to the date of the original filing, the service of process must issue and be received by the proper defendant within the thirty days after the plaintiff received his right-to-sue letter.[27] Generally, courts have read literally the requirement for naming the proper defendant, thus making it imperative that the plaintiff name the appropriate party.[28] However, it is not uncommon for the pro se plaintiff to name the wrong defendant. During the pursuit of Title VII administrative remedies, it is usually the agency

---

22. 42 U.S.C. § 2000e-16(c) (1988). The statute states:

> Within thirty days of receipt of notice of final action taken by a department, agency, or unit . . . or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, . . . or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

*Id.* 42 U.S.C. § 2000e-5 governs all civil actions brought under Title VII. The Rehabilitation Act of 1973 makes the remedies of 42 U.S.C. § 2000e-16 available to persons claiming discrimination on the basis of handicap. 29 U.S.C. § 794a(a)(1) (1988). Accordingly, the procedural requirements of Title VII also apply to claims brought under the Rehabilitation Act. *Id.*

23. Baldwin County Welcome Center v. Brown, 466 U.S. 147, 148 (1984) (per curiam).

24. 42 U.S.C. § 2000e-16(c) (1988).

25. FED. R. CIV. P. 3.

26. 42 U.S.C. § 2000e-16(c) (1988).

27. Schiavone v. Fortune, 477 U.S. 21, 31 (1986); FED. R. CIV. P. 15(c). For further discussion of this requirement, see *infra* text accompanying notes 58-74.

28. Warren v. Department of Army, 867 F.2d 1156, 1159 (8th Cir. 1989); Johnson v. United States Postal Serv., 861 F.2d 1475, 1478 (10th Cir. 1988), *cert. denied*, 110 S. Ct. 54 (1989); Mondy v. Secretary of Army, 845 F.2d 1051, 1052-53 (D.C. Cir. 1988); Paulk v. Department of Air Force, 830 F.2d 79, 81 (7th Cir. 1987); Williams v. Army & Air Force Exch. Serv., 830 F.2d 27, 28 (3d Cir. 1987); McGuinness v. United States Postal Serv., 744 F.2d 1318, 1322-23 (7th Cir. 1984); Cooper v. United States Postal Serv., 740 F.2d 714, 715, 717 (9th Cir. 1984), *cert. denied*, 471 U.S. 1022 (1985).

rather than the agency head who is the named defendant and who responds to the charge.[29]

## B. *Proceeding In Forma Pauperis*

An aggrieved individual without sufficient assets to finance litigation may attempt to proceed in forma pauperis.[30] The in forma pauperis statute allows persons unable to afford the cost of litigation to file civil actions in the federal courts without payment of fees or costs and to request appointment of counsel by the court.[31] Pursuant to the statute, such simultaneous requests must be accompanied by an affidavit of poverty to the appropriate federal court including a statement of

---

29. *See* L. MODJESKA, *supra* note 21, § 2.7, at 219-21. Perhaps employees name the agency rather than the agency head as the defendant because employees generally consider the agency to be their employer, rather than the individual who is the agency head. *See, e.g.*, Johnson v. United States Postal Serv., 113 F.R.D. 73, 77 (D. Colo. 1986), *aff'd*, 861 F.2d 1475 (10th Cir. 1988), *cert. denied*, 110 S. Ct. 54 (1989). See *supra* note 21 for a discussion of the administrative process.

30. 28 U.S.C. § 1915 (1988).

31. *Id.* The cases discussed in this Comment involve the use of the federal in forma pauperis statute in Title VII cases. However, Title VII also independently provides for a waiver of fees and the appointment of counsel. 42 U.S.C. § 2000e-5(f) (1988). At least one court has ruled that 28 U.S.C. § 1915 does not apply to requests for counsel under Title VII and that instead, the provisions of Title VII, 42 U.S.C. § 2000e-5(f), apply exclusively. Edmonds v. E.I. duPont deNemours & Co., 315 F. Supp. 523, 525 (D. Kan. 1970). Other courts (based upon their silence on this matter) have apparently found by implication that a Title VII plaintiff may proceed under 28 U.S.C. § 1915 rather than under 42 U.S.C. § 2000e-5(f). *See, e.g.*, Warren v. Department of Army, 867 F.2d 1156 (8th Cir. 1989); Johnson v. United States Postal Serv., 861 F.2d 1475 (10th Cir. 1988), *cert. denied*, 110 S. Ct. 54 (1989); Mondy v. Secretary of Army, 845 F.2d 1051 (D.C. Cir. 1988); Paulk v. Department of Air Force, 830 F.2d 79 (7th Cir. 1987). For a discussion of these cases, see *infra* notes 75-166 and accompanying text.

There appears to be little or no precedent regarding the circumstances in which counsel will be appointed in the case of a civil in forma pauperis proceeding. The United States Court of Appeals for the District of Columbia is the only circuit to have published a handbook containing a procedure regarding these cases. UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES ch. VI (1987) [hereinafter COURT OF APPEALS HANDBOOK], *reprinted in* D.C. FEDERAL COURTS HANDBOOK § 1.331, at 149-54 (S. Glasser & A. Glasser eds. 1990). This handbook states in relevant part:

> The Criminal Justice Act, 18 U.S.C. § 3006A, does not provide for the appointment of counsel in non-criminal cases. Thus, even though a party in a civil appeal may be granted leave to proceed *in forma pauperis*, counsel will not ordinarily be provided by the [c]ourt. The appellant may file a motion for the appointment of counsel. If the [c]ourt grants the motion, it may refer the appellant to a legal aid organization, or a law school clinical program, or it may appoint a private attorney who has indicated a willingness to serve without compensation in non-criminal cases.

COURT OF APPEALS HANDBOOK, *supra*, at 29, *reprinted in* D.C. FEDERAL COURTS HANDBOOK, *supra*, at 151.

the nature of the action and the entitlement to relief.[32] The court may dismiss the application if it deems that the affidavit of poverty contains false statements or that the action is frivolous or malicious.[33]

Once a party has filed a motion to proceed in forma pauperis, differences exist among the courts of appeals as to when and whether a court will authorize issuance of a complaint.[34] A court must determine whether the plaintiff meets the initial requirements to proceed in forma pauperis.[35] To meet these requirements, the plaintiff must demonstrate indigency.[36] The court must then decide whether the plaintiff's action is frivolous.[37]

Two approaches have developed regarding when courts make this

---

32. *See* 28 U.S.C. § 1915 (1988). The statute states in relevant part:

> (a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.
>
> An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.
>
> . . . .
>
> (c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.
>
> (d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

*Id.*

Courts and commentators have noted that the statute balances an indigent's right to have access to the judicial system against the potential for abuse because the statute explicitly permits the court to dismiss frivolous claims. *See* Jones v. Morris, 777 F.2d 1277, 1279 (7th Cir. 1985), *cert. denied*, 475 U.S. 1053 (1986); Phillips v. Mashburn, 746 F.2d 782, 784 (11th Cir. 1984); Catz & Guyer, *Federal In Forma Pauperis Litigation: In Search of Judicial Standards*, 31 RUTGERS L. REV. 655 (1978); Feldman, *Indigents in the Federal Courts: The In Forma Pauperis Statute—Equality and Frivolity*, 54 FORDHAM L. REV. 413 (1985); Note, *Petitions to Sue In Forma Pauperis In Federal Courts: Standards and Procedures for the Exercise of Judicial Discretion*, 56 B.U.L. REV. 745 (1976).

33. 28 U.S.C. § 1915(a) (1988). The federal in forma pauperis statute is notably lacking in specific guidelines and procedures to govern the federal courts in considering motions to proceed in forma pauperis. For commentary on this issue, see Catz & Guyer, *supra* note 32; Note, *supra* note 32.

34. Note, *supra* note 32, at 753-54. The discussion in this Comment relates to problems arising due to the varying approaches of the United States courts of appeals regarding the issuance of a complaint. The case law is relatively silent about standards to be used relative to the appointment of counsel in civil proceedings. *See supra* note 31.

35. McCone v. Holiday Inn Convention Center, 797 F.2d 853, 854 (10th Cir. 1986).

36. 28 U.S.C. § 1915(a) (1988).

37. *Id.*

determination of the seriousness of the action.[38] Under the first alternative, the court will consider before the docketing of the complaint whether or not the petition is frivolous based solely on consideration of the motion to proceed in forma pauperis.[39] Alternatively, the court will allow the plaintiff's complaint to be docketed, postponing consideration as to whether or not the claim is frivolous.[40] If the court opts for the second alternative, it may authorize issuance of service immediately upon filing,[41] or it may postpone service of process until after it considers whether or not the complaint is frivolous.[42]

For a plaintiff facing the thirty-day limitations period of Title VII, the effect is the same whether the court postpones granting the in forma pauperis motion until after docketing of the complaint or whether it dismisses the action before docketing and service.[43] In either case, the delay may preclude notice of the suit to the appropriate parties during the thirty-day limitations period. Insufficient notice during the limitations period may preclude relation back under Rule 15(c) of any amended complaint and result in dismissal of the action.[44]

Once a court has granted leave to proceed in forma pauperis, it is the responsibility of the United States Marshal to serve the summons and complaint on behalf of the plaintiff.[45] If service is to be made upon the United States government it must be done in accordance with Federal Rule of Civil Procedure 4(d)(4) which requires service upon the appropriate United States Attorney and the United States Attorney General.[46]

---

38. Note, *supra* note 32, at 753-54.

39. Paulk v. Department of Air Force, 830 F.2d 79, 82 (7th Cir. 1987).

40. McCone v. Holiday Inn Convention Center, 797 F.2d 853, 854 (10th Cir. 1986).

41. FED. R. CIV. P. 4(a) ("Upon the filing of the complaint the clerk shall forthwith issue a summons . . . ."); FED. R. CIV. P. 4(d) ("The summons and complaint shall be served together.").

42. *McCone*, 797 F.2d at 854.

43. *See* Johnson v. United States Postal Serv., 861 F.2d 1475, 1476, 1478 (10th Cir. 1988), *cert. denied*, 110 S. Ct. 54 (1989); *Paulk*, 830 F.2d at 80 n.1, 81.

44. For a discussion of Federal Rule of Civil Procedure 15(c), see *infra* text accompanying notes 48-74.

45. 28 U.S.C. § 1915(c) (1988); FED. R. CIV. P. 4(c)(2)(B)(i); *see also* Rochon v. Dawson, 828 F.2d 1107, 1110 (5th Cir. 1987) ("[A] plaintiff proceeding in forma pauperis is entitled to rely upon service by the U.S. Marshals . . . ."). Normally service of summons and complaint shall "be served by any person who is not a party and is not less than 18 years of age." FED. R. CIV. P. 4(c)(2)(A). The Rule specifies the narrow circumstances where the United States Marshal is required to effect service. FED. R. CIV. P. 4(c)(2)(B).

46. *See* FED. R. CIV. P. 4(d)(4). The Rule states that service shall be made:

> Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by

### C. *The Necessity of Naming the Proper Defendant: The Standards for Relation Back and Schiavone v. Fortune*

Problems arise when a plaintiff has erred under the second requirement of Title VII and has named and served the wrong defendant within the thirty-day limitations period. Once the court has notified the plaintiff of this error, he or she will normally attempt to amend the complaint in order to name the proper defendant.[47]

The Federal Rules of Civil Procedure determine the standards required to allow parties to amend their pleadings during the course of litigation. Rule 15(c) states the criteria for determining whether or not an amended pleading will relate back to the date of the original pleading in order to satisfy any requisite limitations period.[48] The Rule allows the addition of both parties and claims.[49]

In 1966, Rule 15(c) was amended to indicate the standards to be applied when an amendment changes the name of the defendant and

---

sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.

*Id.*

47. Mondy v. Secretary of Army, 845 F.2d 1051, 1054 (D.C. Cir. 1988); *Paulk*, 830 F.2d at 81.

48. FED. R. CIV. P. 15(c). The Rule states:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment, that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or the United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

*Id.*

Accordingly, an amendment that relates back will be treated as having been filed as of the date of the original complaint. If relation back is allowed, the amended complaint will not be subject to attack on the basis of a statute of limitations.

49. *Id.* The addition of a claim will generally be allowed where the pleading has been timely filed and served on the proper party. *See* Schiavone v. Fortune, 477 U.S. 21 (1986). See *infra* notes 58-74 and accompanying text for a discussion of *Schiavone* and the requirements for relation back under Rule 15(c).

to allow imputed notice of an action to a federal agency or officer when service is made upon the United States Attorney or Attorney General.[50] The Advisory Committee Notes which accompanied these additions indicated that the problem of amended pleadings changing the name of the party defendant "ha[d] arisen most acutely in certain actions by private parties against officers or agencies of the United States."[51] The Advisory Committee also discussed several cases where Social Security claimants had mistakenly named "the United States, the Department of HEW, the 'Federal Security Administration' (a nonexistent agency), and a Secretary who had retired from the office . . . ."[52] After the expiration of the requisite limitations period, the claimants attempted to amend their complaints to name the proper defendant, the Secretary of Health, Education and Welfare.[53] The motions to amend were denied on the basis that they amounted to new proceedings and were therefore untimely.[54] The Advisory Committee noted that the policy of a limitations period "would not have been offended by allowing relation back in the[se] situations"[55] because "the government was put on notice of the claim within the stated period."[56] The Advisory Committee expressly noted that, "[i]n these circumstances, characterization of the amendment as a new proceeding is not

---

50. FED. R. CIV. P. 15(c). The second and third sentences of the present rule were amended in 1966. For the current text of Rule 15(c), see *supra* note 48.

51. FED. R. CIV. P. 15(c) advisory committee's note.

52. *Id.*

53. *Id.*

54. *Id.* (citing Cohn v. Federal Sec. Admin., 199 F. Supp. 884, 885 (W.D.N.Y. 1961); Cunningham v. United States, 199 F. Supp. 541 (W.D. Mo. 1958); Hall v. Department of HEW, 199 F. Supp. 833 (S.D. Tex. 1960); Sandridge v. Folsom, 200 F. Supp. 25 (M.D. Tenn. 1959)).

55. *Id.*

56. *Id.* In a critique of Rule 15(c) and *Schiavone*, Professor Robert Brussack suggested that the Advisory Committee was perhaps mistaken in its assumption that the government received notice before expiration of the limitations period. Brussack, *Outrageous* Fortune*: The Case for Amending Rule 15(c) Again*, 61 S. CAL. L. REV. 671, 681 (1988). For additional commentary on Rule 15(c) since *Schiavone*, see Bauer, Schiavone*: An Un-*Fortune-*ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 720 (1988); Epter, *An Un-*Fortune-*Ate Decision: The Aftermath of the Supreme Court's Eradication of the Relation-Back Doctrine*, 17 FLA. ST. U.L. REV. 713 (1990); Lewis, *The Excessive History of Federal Rule 15(c) and its Lessons for Civil Rules Revision*, 85 MICH. L. REV. 1507 (1987); Note, Schiavone v. Fortune: *A Clarification of the Relation Back Doctrine*, 36 CATH. U.L. REV. 499 (1987); Note, Schiavone v. Fortune: *Notice Becomes a Threshold Requirement for Relation Back Under Federal Rule 15(c)*, 65 N.C.L. REV. 598 (1987) [hereinafter Note, *Threshold Requirement*]; Note, *Looking Forward: A Fairer Application of the Relation Back Provisions of Federal Rule of Civil Procedure 15(c)*, 63 N.Y.U. L. REV. 131 (1988) [hereinafter Note, *Looking Forward*]. See *infra* notes 295-303 and accompanying text for further discussion of the Brussack article.

responsive to the reality, but is merely question-begging; and to deny relation back is to defeat unjustly the claimant's opportunity to prove his case."[57]

The 1986 Supreme Court decision of *Schiavone v. Fortune*[58] addressed the application of Rule 15(c) "to a less-than-precise denomination of a defendant in complaints filed in federal court near the expiration of the period of limitations."[59] In *Schiavone*, three parties alleging defamation filed suit in federal district court against Fortune magazine.[60] Each complaint named Fortune as the defendant.[61] The named defendant should have been Time, Inc., the publisher of Fortune magazine.[62] After expiration of a one-year limitations period, the plaintiffs amended their complaints to name "Fortune, also known as Time, Incorporated" as the defendant.[63] Time, Inc. alleged that it had not received notice of the suit within the limitations period, and therefore, the amendments could not relate back under Rule 15(c) to the original date of filing against Fortune.[64]

The Court agreed with Time, Inc. and refused to allow the amended complaints to relate back to the date of the original pleadings.[65] In its decision, the Court set out a four-part test to determine

---

57. FED. R. CIV. P. 15(c) advisory committee's note (citing Byse, *Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform*, 77 HARV. L. REV. 40 (1963)). In this influential article, Byse essentially suggested the amendments to Rule 15(c) which were subsequently adopted in 1966. *Id.* For a discussion of the Byse article and the 1966 amendments in light of *Schiavone*, see Brussack, *supra* note 56.

58. 477 U.S. 21 (1986).

59. *Id.* at 22.

60. *Id.*

61. *Id.* at 22-23.

62. *Id.* at 23.

63. *Id.*

64. *Id.* at 24. The magazine containing the alleged defamation had a publication date of May 31, 1982. *Id.* at 22. The *Schiavone* petitioners filed their complaints on May 9, 1983, and mailed the complaints to Time's agent on May 20, 1983. *Id.* at 22-23. Time received the complaints on May 23, 1983, but refused service because Time was not named as the defendant. *Id.* at 23. On July 18, 1983, the petitioners attempted to amend their complaints naming Time, Inc. as the defendant. *Id.* While the district court did not rule on this issue, the court of appeals found that substantial distribution of the magazine took place on May 19, 1982. *Id.* at 25. Accordingly, no service was attempted upon any party prior to the expiration of the limitations period on May 19, 1983. *Id.* at 29.

65. *Id.* at 27. The *Schiavone* decision attempted to resolve the conflict among the courts of appeals regarding the issue of relation back. *Id.* at 22. The conflict was between a strict construction of Rule 15(c), as adopted by *Schiavone*, and a more liberal standard which allowed relation back when a new party defendant was named after expiration of a limitations period. *Compare* Hughes v. United States, 701 F.2d 56 (7th Cir. 1982) (no relation back where plaintiff originally named the Federal Bureau of Investigation and the United States Department of Justice and later attempted to amend the complaint to properly name the United States) *and* Watson v. Unipress, Inc., 733 F.2d 1386 (10th Cir. 1984)

whether an amendment will be permitted under Rule 15(c).[66] The Court stated:

> Relation back is dependent upon four factors, all of which must be satisfied: (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.[67]

The Court determined that notice to Time, Inc. had occurred after the end of the limitations period as no party had received notice before the end of one year.[68] The amended complaint, therefore, failed to satisfy the fourth requirement of the test.[69] In support of this conclusion, the Court in *Schiavone* relied upon the 1966 Advisory Committee's Notes to the Rule 15(c) amendments.[70]

The Court noted that the Advisory Committee would also require notice within the limitations period to the party brought in by the amendment.[71] The Court dismissed the plaintiffs' contention that Rule 15(c) should be read in conjunction with Federal Rule of Civil Procedure 4, which requires service of the summons within 120 days

---

(no relation back where plaintiff originally named a John Doe defendant and later attempted to amend the complaint identifying the defendant) *with* Ingram v. Kumar, 585 F.2d 566 (2d Cir. 1978) (court allowed relation back where plaintiff amended the complaint to change middle initial of defendant which also entailed notice to an entirely different party), *cert. denied*, 440 U.S. 940 (1979) *and* Kirk v. Cronvich, 629 F.2d 404 (5th Cir. 1980) (court allowed relation back where plaintiff originally sued sheriff's office and amended complaint to name the sheriff as an individual).

66. *Schiavone*, 477 U.S. at 29. This four-part test is essentially a restatement of the elements of Rule 15(c).

67. *Id.*

68. *Id.* at 30.

69. *Id.* The Court also discussed an "identity-of-interest" exception developed by some of the courts of appeals to allow relation back where another defendant is named after the expiration of the limitations period. *Id.* at 28-29. The exception provides that "[t]imely filing of a complaint, and notice within the limitations period to the party named in the complaint, permit imputation of notice to a subsequently named and sufficiently related party" and would, if allowed, arguably satisfy the third factor of the four-part test. *Id.* at 29. The Court did not apply the exception, stating that since neither Time, Inc. nor Fortune had received notice until after the expiration of the limitations period, no timely notice could be imputed to Time. *Id.* (citing Hernandez Jimenez v. Calero Toledo, 604 F.2d 99, 102-03 (1st Cir. 1979); Norton v. International Harvester Co., 627 F.2d 18, 20-21 (7th Cir. 1980)). For a discussion of the identity-of-interest exception and *Schiavone*, see Note, *Threshold Requirement*, *supra* note 56.

70. *Schiavone*, 477 U.S. at 30-31.

71. *Id.* at 31.

after filing the complaint.[72] Focusing on the history of the amendment rather than the literal wording of the Rule, the plaintiffs had alleged that Rule 15(c) was amended in 1966 "for the express purpose of allowing relation back of a change in the name or identity of a defendant when, although the limitations period for filing had run, the period allowed by Rule 4 for timely service had not yet expired."[73] The Court rejected this argument stating that Rule 4 deals only with *process*, or the time allowed "for the service of a timely filed complaint," whereas the emphasis of Rule 15(c) is upon the *commencement* of the action, noting that it is Federal Rule of Civil Procedure 3 that defines commencement of the action.[74]

## II. JUDICIAL TREATMENT OF EQUITABLE TOLLING AND RELATION BACK

The strict reading given to Rule 15(c) by the United States Supreme Court in *Schiavone* has resurrected the problems presumably addressed by the 1966 amendments to the Rule.[75] The Court's construction of Rule 15(c) "leaves potentially meritorious claims unjustifiably vulnerable to the limitations defense on account of easily made pleading mistakes."[76] The following Section introduces five cases in which courts have addressed the issue of equitable tolling of the statute of limitations where a Title VII, in forma pauperis plaintiff, attempting to sue the federal government, has not named the proper defendant during the limitations period. In each case, the plaintiff attempted to amend his or her complaint to correct the name of the defendant pursuant to the relation back provisions of Rule 15(c).[77] In two cases, the court refused to allow the amendment,[78] while in the other three cases, the plaintiffs were allowed to amend their complaints by naming the proper parties.[79]

---

72. *Id.* at 30; FED. R. CIV. P. 4(j).

73. *Schiavone*, 477 U.S. at 26 (citing Brief for Petitioners at 5).

74. *Id.* at 30; FED. R. CIV. P. 3 ("A civil action is commenced by filing a complaint with the court.").

75. *See generally* Brussack, *supra* note 56.

76. *Id.* at 672.

77. FED. R. CIV. P. 15(c).

78. Soto v. United States Postal Serv., 905 F.2d 537 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 679 (1991); Johnson v. United States Postal Serv., 861 F.2d 1475 (10th Cir. 1988), *cert. denied*, 110 S. Ct. 54 (1989).

79. Warren v. Department of Army, 867 F.2d 1156 (8th Cir. 1989); Mondy v. Secretary of Army, 845 F.2d 1051 (D.C. Cir. 1988); Paulk v. Department of Air Force, 830 F.2d 79 (7th Cir. 1987).

## A. *No Equitable Tolling to Allow Relation Back*

### 1. *Johnson v. United States Postal Service*

In *Johnson v. United States Postal Service*,[80] a pro se plaintiff alleging employment discrimination filed a motion to proceed in forma pauperis five days after receiving a right to sue letter from the EEOC.[81] Four days later, the district court granted the plaintiff's motion to proceed in forma pauperis, but denied the appointment of counsel.[82] On the final day of the thirty-day limitations period, the plaintiff, proceeding without an attorney, filed his complaint, naming the Postal Service as the defendant[83] rather than the Postmaster General, as the statute required.[84] The district court then directed the United States Marshal to serve the complaint and summons.[85] Service was not effected on the Postal Service until several days later.[86] The United States Marshal did not serve the appropriate United States Attorney or the Attorney General, as required under the Federal Rules of Civil Procedure.[87] Five months later, the district court issued an order to show cause why service was incomplete.[88] The plaintiff then obtained an attorney and served the United States Attorney and the United States Attorney General.[89] The Postal Service moved for dismissal based upon the plaintiff's failure to name the proper defendant.[90] The trial court granted the motion, finding that the plaintiff had not named or served the correct party and thus, could not amend his

---

80. 861 F.2d 1475 (10th Cir. 1988), *cert. denied*, 110 S. Ct. 54 (1989).

81. *Id.* at 1476. The plaintiff had been dismissed from his position as a bulk mail handler allegedly due to a disability of his right foot. *Id.* Accordingly, the basis for his complaint fell under section 501 of the Rehabilitation Act of 1973 (codified as amended at 29 U.S.C. § 791 (1988)). *Id.* at 1477. This statute is governed by the limitational requirements of 42 U.S.C. § 2000e-16(c). See *supra* note 22 for the text of the statute.

82. *Johnson*, 861 F.2d at 1476. Little authority exists regarding a court's discretion to grant or deny the appointment of counsel to in forma pauperis plaintiffs. *See* Warren v. Department of Army, 867 F.2d 1156 (8th Cir. 1989); *Johnson*, 861 F.2d 1475; *Mondy*, 845 F.2d 1051; *Paulk*, 830 F.2d 79; Johnson v. United States Postal Serv., 113 F.R.D. 73 (D. Colo. 1986), *aff'd*, 861 F.2d 1475 (10th Cir. 1988), *cert. denied*, 110 S. Ct. 54 (1989); Catz & Guyer, *supra* note 32; Note, *Controlling and Deterring Frivolous In Forma Pauperis Complaints* 55 FORDHAM L. REV. 1165 (1987); Note, *supra* note 32; *see also supra* note 31.

83. *Johnson*, 861 F.2d at 1476. The plaintiff also named his local union as a defendant. The claim against the union was dismissed by the district court. *Id.*

84. 42 U.S.C. § 2000e-16(c) (1988). The statute requires service upon the "head of the department" as the appropriate defendant. *Id.* For the text of this statutory provision, see *supra* note 22.

85. *Johnson*, 861 F.2d at 1476.

86. *Id.*

87. FED. R. CIV. P. 4(c)(2)(B)(i), 4(d)(4), 4(d)(5).

88. *Johnson*, 861 F.2d at 1476.

89. *Id.* The plaintiff never named or served the Postmaster General. *Id.* at 1478.

90. *Id.* at 1477.

complaint.[91] Accordingly, the matter was dismissed for lack of subject matter jurisdiction.[92]

In *Johnson*, the United States Court of Appeals for the Tenth Circuit affirmed the decision of the trial court[93] and upheld summary judgment in favor of the defendant.[94] In so doing, the court would not allow the plaintiff to amend his complaint to name the proper defendant. The *Johnson* majority ruled that an amendment would not meet the fourth criteria of the test outlined in *Schiavone v. Fortune*,[95] finding that no notice of the suit had been given to the defendant during the limitations period.[96] The plaintiff argued that he was dependent upon the United States Marshal for service on both the named defendant and, pursuant to the requirements of Federal Rule of Civil Procedure 4, the United States Attorney and the Attorney General.[97]

---

91. Johnson v. United States Postal Serv., 113 F.R.D. 73, 74, 77 (D. Colo. 1986), *aff'd*, 861 F.2d 1475 (10th Cir. 1988), *cert. denied*, 110 S. Ct. 54 (1989).

92. *Id.*

93. *Johnson*, 861 F.2d at 1476.

94. *Id.*

95. *Id.* at 1480 & n.5 (citing Schiavone v. Fortune, 477 U.S. 21 (1986)); *see supra* text accompanying notes 58-74.

96. *Id.* at 1480. The *Johnson* majority also rejected application of the identity-of-interest exception noting that there was no "notice within the limitations period." *Id.* at 1481-82. For a discussion of the Supreme Court's treatment of the identity-of-interest exception in *Schiavone*, see *supra* note 69.

97. *Id.* at 1480-81. For the text of Rule 4(d)(4), see *supra* note 46. Rule 15(c) provides that service upon the United States Attorney or the Attorney General constitutes sufficient notice of an action to allow relation back with respect to suits against the United States or any of its agencies or officers. FED. R. CIV. P. 15(c). For the text of Rule 15(c), see *supra* note 48. Although this second paragraph of the Rule appears to be as "plain" in its meaning as the first paragraph (Schiavone v. Fortune, 477 U.S. 21, 30 (1986)), at least one court has chosen to ignore this section of 15(c). Stewart v. United States Postal Serv., 649 F. Supp. 1531 (S.D.N.Y. 1986). In *Stewart*, a pro se plaintiff, alleging employment discrimination under Title VII, received an extension of time for service of his complaint from the district court. *Id.* at 1532. The plaintiff properly served the United States Attorney and the Attorney General within the extended period but did not serve the Postmaster General. *Id.* at 1533. The court did not apply or discuss the provisions of Rule 15(c) allowing substitute service on the Attorney General or the United States Attorney. Instead, the court strictly applied 42 U.S.C. § 2000e-16, citing Brown v. General Services Administration, 425 U.S. 820 (1976). In *Brown*, the Supreme Court ruled that 42 U.S.C. § 2000e-16 is the "exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." *Brown*, 425 U.S. at 829. The *Stewart* court, therefore, concluded that the plaintiff had to serve the Postmaster General during the thirty days in order to allow the relation back of amendments. *Stewart*, 649 F. Supp. at 1533. None of the United States courts of appeals have followed this interpretation. Reliance on *Brown* in this respect appears to be somewhat misguided. The essential holding of *Brown* was that other remedies for employment discrimination available at the time of enactment of 42 U.S.C. § 2000e-16 in 1972 were preempted by this amendment which allowed suits against federal defendants. *Brown*, 425 U.S. at 829. *Brown* is silent regarding the application of the Federal Rules of Civil Procedure to the statute.

The court rejected the plaintiff's argument that his problem was caused by the Marshal's inadequate service,[98] and blamed the failure of service upon "the inadequacy of the plaintiff's complaint"[99] since it was filed on the last day of the limitations period. The court found that the Marshal was not at fault as the service was within the 120 days permissible under Rule 4(j).[100] The court noted that even if the United States Attorney or Attorney General had been served by the Marshal in accordance with Rule 4(d) at the time of Mr. Johnson's filing, service still would have been inadequate unless it had been effected on the day of filing.[101] In addition, the court rejected the plaintiff's contention that the thirty-day limitations period should be equitably tolled.[102] Relying on Tenth Circuit precedent,[103] the court acknowledged the existence of the doctrine of equitable tolling but stated that the limitations period would be tolled only where there had been some "active deception."[104] The court concluded that the plaintiff "was not 'lulled into inaction' in any way that [rose] to the active deception standard" and, therefore, the plaintiff did not present an appropriate case for application of equitable tolling.[105]

The *Johnson* dissent argued that this case presented sufficient evidence to allow the court to exercise its general power to equitably toll the statute of limitations period, and that relation back under Rule

---

98. *Johnson*, 861 F.2d at 1480.

99. *Id.*

100. *Id.* The Rule states in relevant part:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

FED. R. CIV. P. 4(j).

101. *Johnson*, 861 F.2d at 1480.

102. *Id.*

103. *Id.* at 1481 (citing Martinez v. Orr, 738 F.2d 1107, 1110-11 (10th Cir. 1984); Gonzalez-Aller Balseyro v. GTE Lenkurt, Inc., 702 F.2d 857, 859 (10th Cir. 1983)).

104. *Johnson*, 861 F.2d at 1481.

105. *Id.* Another issue regarding equitable tolling in suits against the federal government is whether Title VII's time limits are jurisdictional or limitational. If the time periods are viewed as jurisdictional, the strict thirty-day limit for filing and service must be met as a prerequisite to suit. Paulk v. Department of Air Force, 830 F.2d 79, 81 (7th Cir. 1987) (citing Sims v. Heckler, 725 F.2d 1143 (7th Cir. 1984)). However, if the limits are viewed as limitational, they are then subject to "waiver, estoppel, and equitable tolling." Zipes v. Trans World Airlines, 455 U.S. 385, 393 (1982). In a recent Title VII decision, the United States Supreme Court resolved this issue and held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." Irwin v. Veterans Admin., 111 S. Ct. 453, 457 (1990). For a discussion of *Irwin*, see *infra* notes 215-26 and accompanying text.

15(c) should have been allowed.[106] The dissent proposed that once the court granted the in forma pauperis motion, the court "was required by federal law to properly serve [the] defendant."[107] The dissent reasoned that this resulted in "reasonable reliance [by the plaintiff] on the process authorized by statute and implemented by officers of the court"[108] and that, therefore, the plaintiff was actually "lulled into inaction."[109] In addition, the dissent argued that the provisions of the in forma pauperis statute, which direct that the court, via the United States Marshal, serve process and "perform all duties" on behalf of the plaintiff,[110] "impose[ ] a special duty upon officers of the court to assist impecunious and generally unsophisticated plaintiffs to navigate safely through the procedural maze created by applicable statutes and rules."[111]

The dissent would have excused the plaintiff's delay in filing the complaint and rejected the majority's position that the Marshal was excused from failure to effect timely service. The dissent disagreed with the majority's argument that the plaintiff's failure to file the complaint until the final day of the limitations period and the 120-day period of Rule 4 for service excused the Marshal from failure to effect timely service.[112] The dissent argued that "a plaintiff could be completely out of court even though the Marshal proceeded within the time limit permitted by [Rule 4(j)]."[113] The dissent noted that even if the plaintiff's complaint had been filed within one week of the court's denial of the motion for appointment of counsel (instead of the actual twenty-one days), "the Marshal would still have the same 120 days within which to act."[114] Therefore, the plaintiff would still be unable

---

106. *Johnson*, 861 F.2d at 1482-89 (McKay, J., dissenting).

107. *Id.* at 1486.

108. *Id.* The dissent further stated:

> The majority draws an artificial distinction between circumstances where one party is *explicitly* told something that leads to the forfeiting of rights and situations such as the present one where reliance on a court order is not deemed overt enough to qualify. I respectfully submit that there is no principled basis for that distinction. The issue is *reliance* and how that reliance is fostered, regardless of the method employed. This is especially true when dealing with an unsophisticated plaintiff such as Mr. Johnson.

*Id.* at 1487.

109. *Id.*

110. *Id.* at 1486 (citing 29 [sic] U.S.C. § 1915(c)). For the full text of the in forma pauperis statute, see *supra* note 32.

111. *Johnson*, 861 F.2d at 1486.

112. *Id.*

113. *Id.* at 1486 n.10.

114. *Id.* at 1486. The dissent noted that the record revealed no evidence of undue delay by the plaintiff in filing his complaint. *Id.* In a separate argument, the dissent pro-

to present his claim even if service was effected by the Marshal in compliance with Rule 4 with a reasonable delay of "fifteen or twenty days after the complaint was filed."[115] The dissent further argued that this outcome rose to an " 'active deception' which 'in some extraordinary way [prevents [a] plaintiff] from asserting his or her rights,' " and should result in equitable tolling.[116]

### 2. *Soto v. United States Postal Service*

In *Soto v. United States Postal Service*,[117] a case similar to *Johnson*, a party alleging employment discrimination by the Postal Service filed a motion to proceed in forma pauperis and a complaint in the form of a letter, thirty days after receiving a right-to-sue letter from the EEOC.[118] The United States District Court for the District of Puerto Rico granted the motion.[119] The complaint was officially docketed thirty-five days after receipt of the right-to-sue letter.[120] The Postal Service and the United States Attorney in San Juan received process approximately five months later.[121] The Postal Service moved for dismissal of the complaint and the plaintiff, having obtained counsel, filed a motion to amend naming the proper defendant.[122] The district court adopted the recommendations of a magistrate who found that *Schiavone* barred the plaintiff's attempt to amend.[123] The district court further found that the circumstances did not warrant the appli-

---

posed that timely notice to the Postmaster General could be imputed from notice to the United States Postal Service under the identity-of-interest exception, thus satisfying the third factor of *Schiavone*'s four-part test. *Id.* at 1488-89. Citing the dissent in Gonzales v. Secretary of Air Force, 824 F.2d 392 (5th Cir. 1987) (Brown, J., dissenting), *cert. denied*, 485 U.S. 969 (1988), the *Johnson* dissent argued that the head of an agency and the agency itself are functionally the same for the purposes of defending a Title VII suit. *Johnson*, 861 F.2d at 1488-89 (McKay, J., dissenting). The dissenting opinions in *Johnson* and *Gonzales* both argued that the same people within the agency or department receive notice of the suit, appear in court, prepare all pleadings, etc., regardless of whether the agency head or the agency itself is named. *Id.* For a discussion of the *Johnson* majority's position on the identity-of-interest exception and the *Schiavone* discussion on identity-of-interest, see *supra* notes 96 & 69, respectively. For the text of the *Schiavone* four-factor relation back test, see *supra* text accompanying note 67.

115. *Johnson*, 861 F.2d at 1486 (McKay, J., dissenting).

116. *Id.* at 1486 n.10.

117. 905 F.2d 537 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 679 (1991).

118. *Id.* at 539. If the court had accepted the letter as the complaint and had docketed it upon receipt, the case may have had a different result.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

cation of equitable tolling.[124]

The United States Court of Appeals for the First Circuit adopted the district court's findings. The court of appeals relied heavily upon the plaintiff's failure to file his complaint until the final day of the limitations period.[125] The court found that the plain meaning of Rule 15(c) "may not be tempered merely by the elements of hardship and sympathy."[126] The court noted that plaintiff Soto's claim was "doomed from the outset, because only virtually instantaneous service would have preserved his ability to later amend to add the proper party."[127] The court declined to equitably toll the limitations period finding that there was no "affirmative showing" of inequity which would justify tolling.[128]

The decision rejected the plaintiff's contention that the right-to-sue letter was confusing, noting that it was apparent from the context of the letter that the "plaintiff must name the head of an agency or department."[129] The court also rejected the plaintiff's arguments that equity should allow tolling as he was proceeding pro se and because process did not issue in a timely manner.[130] The court noted that there was no active deception by any governmental party, and that it would have been impossible for the court to effectuate timely service due to the plaintiff's failure to file until the final day of the limitations period.[131]

The *Johnson* and *Soto* decisions present one end of a spectrum in which courts have declined to use equitable tolling to free Title VII, in forma pauperis plaintiffs from the time limitations of Rule 15(c). The following discussion presents three cases which represent the other end of the spectrum. In these cases, the equitable tolling doctrine was used to allow Title VII, in forma pauperis plaintiffs to amend their complaints after expiration of the limitations period.

### B. *Equitable Tolling Employed to Allow Relation Back*

In contrast to *Johnson* and *Soto*, the United States Courts of Appeals for the District of Columbia,[132] the Seventh Circuit[133] and the

124. *Id.*
125. *Id.* at 539-41.
126. *Id.* at 540 (citing Schiavone v. Fortune, 477 U.S. 21, 30 (1986)).
127. *Id.*
128. *Id.* at 541.
129. *Id.* (quoting Rys v. United States Postal Serv., 886 F.2d 443, 447 (1st Cir. 1989)).
130. *Id.*
131. *Id.*
132. Mondy v. Secretary of Army, 845 F.2d 1051 (D.C. Cir. 1988).

Eighth Circuit[134] have allowed Title VII plaintiffs to proceed with their complaints despite untimely service on the proper defendants.

### 1. *Mondy v. Secretary of Army*

In *Mondy v. Secretary of Army*,[135] a plaintiff, proceeding in forma pauperis, once again named the wrong Title VII defendant in his complaint.[136] Twenty-five days after receipt of his right-to-sue letter, the plaintiff filed his "papers" with the appropriate United States District Court.[137] The district court granted plaintiff Mondy's motion to proceed in forma pauperis and dismissed the case sua sponte.[138] Mondy then moved to alter the judgment, the district court granted the motion, and service followed.[139] Unfortunately for the plaintiff, this resulted in service of the complaint almost four months after the expiration of the limitations period.[140] The district court dismissed the complaint as it had not been served upon the proper parties during the limitations period.[141] The United States Court of Appeals for the District of Columbia reversed, deciding that equitable tolling should apply.[142] Noting that the judicial power to toll should be exercised "only in extraordinary and carefully circumscribed instances," the court found that the facts of the case justified tolling due to the plaintiff's right to rely on the court to effect timely service as provided by the in forma pauperis statute.[143] The court also noted that the plaintiff was diligent in filing the complaint and did not set up a "photo-finish," expecting same day service.[144] Accordingly, the court allowed relation back of an amended complaint correcting the name of the defendant.[145]

---

133. Paulk v. Department of Air Force, 830 F.2d 79 (7th Cir. 1987).

134. Warren v. Department of Army, 867 F.2d 1156 (8th Cir. 1989).

135. 845 F.2d 1051 (D.C. Cir. 1988).

136. *Id.* at 1052. The plaintiff named his activity commander, rather than the Secretary of the Army. *Id.*

137. *Id.* The plaintiff received his right-to-sue letter on September 23, 1985. *Id.* The opinion does not state the day the complaint was filed but merely indicates that the plaintiff "filed his papers with the court . . . on October 18, 1985." *Id.* Presumably these "papers" were the motion to proceed in forma pauperis with its accompanying statement of the claim, which could have been deemed by the court to be the complaint. *See id.* at 1054.

138. *Id.* at 1053 n.2.

139. *Id.*

140. *Id.* at 1054. The United States Attorney was served at this time. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 1057.

144. *Id.*

145. *Id.*

### 2. *Paulk v. Department of Air Force*

In *Paulk v. Department of Air Force*,[146] a pro se plaintiff proceeding in forma pauperis also named the wrong defendant in a Title VII action against the federal government.[147] Due to the length of time taken by the district court in consideration of the in forma pauperis petition, the United States Attorney was not served with the complaint for more than one month after it had been filed and the limitations period had expired.[148] The district court did not allow the plaintiff to amend her complaint. It dismissed the suit because the proper defendant did not receive notice of the suit within the limitations period.[149]

The United States Court of Appeals for the Seventh Circuit reversed this dismissal.[150] The court initially found that service upon the United States Attorney was sufficient to afford notice to the proper defendant, the Secretary of Defense.[151] In making this determination, the court relied upon the literal language of Rule 15(c),[152] which provides that service upon the United States Attorney or Attorney General constitutes sufficient notice to an officer or agency of the federal government to allow relation back of an amended complaint later naming that officer or agency as the defendant.[153] The court noted that the Advisory Committee comments to the 1966 Amendment of Rule 15(c) "ma[d]e clear" that the purpose of this provision in Rule 15(c) "was intended for precisely the situation in the present case."[154] More specifically, the court stated that the amendment was designed "to assist groups, such as Social Security claimants, that were having difficulties ascertaining the proper governmental defendant."[155]

The *Paulk* court then tolled the limitations period, concluding that "[s]ervice of process on the United States Attorney gave, pursuant to Rule 15(c), the proper federal governmental defendant notice of the

---

146. 830 F.2d 79 (7th Cir. 1987).

147. *Id.* at 80. The plaintiff named the Department of the Air Force and not Casper Weinberger, Secretary of Defense. *Id.* The plaintiff alleged employment discrimination on the basis of race. *Id.* The record in the case was unclear as to whether the plaintiff had filed her complaint and in forma pauperis petition within thirty days after her receipt of the right-to-sue letter. *Id.* at 80 n.1. The district court and the court of appeals both assumed that the complaint was timely filed. *Id.*

148. *Id.* at 82.

149. *Id.* at 80-81.

150. *Id.* at 83.

151. *Id.* at 82.

152. FED. R. CIV. P. 15(c). For the text of Rule 15(c), see *supra* note 48.

153. *Paulk*, 830 F.2d at 81-82.

154. *Id.* at 81. For a general discussion of the 1966 amendments, see *supra* text accompanying notes 50-57. *See also* Brussack, *supra* note 56.

155. *Paulk*, 830 F.2d at 83.

action and of the mistaken naming of the wrong governmental defendant."[156] The court noted that the period of time taken by a district court in consideration of a motion to proceed in forma pauperis could consume the entire Title VII thirty-day limitations period.[157] Therefore, the court decided to toll the limitations period during the pendency of such motions to "allow[ ] 28 U.S.C. § 1915 and Rule 15(c) to operate harmoniously, instead of denying the benefits of the 1966 Amendment of Rule 15(c) to the very plaintiffs who are most likely to need it."[158]

### 3. *Warren v. Department of Army*

In *Warren v. Department of Army*,[159] the United States Court of Appeals for the Eighth Circuit also allowed tolling of the limitations period to correct the name of the defendant so as to allow relation back of an amended complaint.[160] In *Warren*, the plaintiff filed his pro se complaint with the district court twenty-three days after receipt of the right-to-sue letter.[161] On the twenty-fourth day, the plaintiff filed a motion to proceed in forma pauperis.[162] After a thirty-two day period for consideration, the district court denied the application.[163] The United States Attorney and Attorney General were served sixty-five days after the limitations period had expired.[164] Relying on ambiguous language in the right-to-sue letter and the extreme length of time taken by the district court in consideration of the in forma pauperis motion, the court of appeals tolled the limitations period and found that service on the United States Attorney was sufficient to allow relation back under Rule 15(c).[165] The court deemed the complaint to

156. *Id.* at 82.

157. *Id.*

158. *Id.* at 83. The *Paulk* court also raised the concern of potential problems of equal protection for in forma pauperis plaintiffs, noting that because the delay in these cases is "solely within the control of the district court," similar claims would be treated differently with regard to relation back "only on the basis of the speed with which the court chose to process them." *Id.* (citing Logan v. Zimmerman Brush Co., 455 U.S. 422, 441-42 (1982) (separate opinion of Blackmun, J.); *Logan*, 455 U.S. at 444 (Powell, J., concurring in judgment)).

159. 867 F.2d 1156 (8th Cir. 1989).

160. *Id.* at 1160. The plaintiff alleged that he was discriminated against because of his race and sex. *Id.* at 1157. The complaint improperly named the Department of the Army rather than the Secretary of Defense. *Id.* at 1157-58.

161. *Id.* at 1157.

162. *Id.* at 1158.

163. *Id.* The district court allowed the plaintiff to pay his fees on an installment basis. *Id.*

164. *Id.*

165. *Id.* at 1160-61.

have been timely served on the United States Attorney and noted that the defendant "acted with 'utmost diligence,' only to find himself caught up in an arcane procedural snare."[166]

## III. ESCAPING THE 15(c) TRAP

*Johnson*, *Soto*, *Mondy*, *Paulk*, and *Warren* all demonstrate that the strict construction given to Rule 15(c) by the United States Supreme Court in *Schiavone* may indeed trap an in forma pauperis plaintiff who has mistakenly named the wrong Title VII defendant. These cases demonstrate that equitable tolling has been the only potential method of escape enabling the plaintiff to pursue the merits of his or her case. In order to successfully convince a court that the limitations period should be tolled, a plaintiff must first maneuver through several steps before he or she is allowed to present a claim before the court. These hurdles include an analysis as to whether equitable tolling is consistent with the applicable statutes and Rules, Title VII, the in forma pauperis statute, and the Federal Rules of Civil Procedure. The analysis then narrows to focus on whether the plaintiff can demonstrate all of the following three elements: active deception or misrepresentation toward the plaintiff by the defendant, the court or the administrative agency which conducted the initial investigation; reliance by the plaintiff upon the court or its officers to effect proper service; and, diligence by the plaintiff in pursuit of the claim.

This Section discusses generally the doctrine of equitable tolling and outlines the obstacles a plaintiff must overcome. The Section then discusses the doctrine of equitable tolling as it specifically applies to the Title VII, in forma pauperis plaintiff, using the facts presented in *Johnson*, *Soto*, *Mondy*, *Paulk*, and *Warren*.[167]

---

166. *Id.* at 1160 (quoting Martinez v. Orr, 738 F.2d 1107, 1112 (10th Cir. 1984)). The *Warren* court also relied upon the identity-of-interest between "the Department of the Army and its Secretary." *Id.* at 1161. The court concluded that notice of the action could be imputed from the Department to the Secretary, thereby satisfying the third factor of the *Schiavone* four-part relation back test. *Id.* at 1160-61; *see* Schiavone v. Fortune, 477 U.S. 21, 29 (1986) (The party to be added "must or should have known that, but for a mistake concerning identity, the action would have been brought against it."). For a discussion of the tests for relation back under Rule 15(c), see *supra* text accompanying notes 58-74. The *Warren* court stated that it "ha[d] little doubt but that the same individual would have received Warren's suit papers regardless of whether the Department or its Secretary were named as defendant." *Warren*, 867 F.2d at 1160-61.

167. This analysis concentrates on the narrow factual situation of the in forma pauperis plaintiff and does not specifically address cases where the plaintiff, while pro se, has not attempted to proceed in forma pauperis. The reason for this distinction is that a plaintiff who is proceeding in forma pauperis will rely more heavily upon the court and its

### A. *The Doctrine of Equitable Tolling of the Limitations Period*

The United States Supreme Court's strict interpretation of Rule 15(c) in *Schiavone* results in the dismissal of potentially meritorious claims when a Title VII plaintiff suing the federal government has named the wrong defendant during the limitations period and later attempts to correct the error through amendment. This result may be unduly harsh, especially where the plaintiff is proceeding pro se and in light of the remedial nature of anti-discrimination legislation. Some courts have responded by equitably tolling the limitations period. Tolling is the method used by the courts to artificially stop the running of time as it applies to a statute of limitations.[168] Hence, tolling the limitations period allows the plaintiff to meet the fourth requirement of the *Schiavone* test, that the correct defendant receive notice of the action within the limitations period.[169] Principles of equity are used to toll a statute of limitations period when notions of fairness and justice so require.[170] The question as to whether a limitations period will be tolled generally arises when a defendant has not received proper notice of the action before the expiration of the statute of limitations.

The Supreme Court has suggested that courts may toll a Title VII limitations period where:

> [A] claimant has received inadequate notice . . . where a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted upon . . . , where the court has led the plaintiff to believe that she had done everything required of her . . . [or] where affirmative misconduct on the part of a defendant lulled the plaintiff into inaction.[171]

---

processes than a plaintiff who is not. See *infra* notes 265-73 and accompanying text for a discussion of the reliance issue.

168. BLACK'S LAW DICTIONARY 1448 (6th ed. 1990). One commentator has suggested that courts may be willing to toll statutes of limitation because these time periods are arbitrarily drawn by the legislature. Fischer, *The Limits of Statutes of Limitation*, 16 SW. U.L. REV. 1, 3 (1986).

169. *Schiavone*, 477 U.S. at 29; *see supra* text accompanying notes 58-74.

170. *See* Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984) (per curiam); Zipes v. Trans World Airlines, 455 U.S. 385 (1982); Warren v. Department of Army, 867 F.2d 1156 (8th Cir. 1989); Mondy v. Secretary of Army, 845 F.2d 1051 (D.C. Cir. 1988); Paulk v. Department of Air Force, 830 F.2d 79 (7th Cir. 1987); Harris v. Walgreen's Distribution Center, 456 F.2d 588 (6th Cir. 1972); Mohler v. Miller, 235 F.2d 153 (6th Cir. 1956).

171. *Baldwin County*, 466 U.S. at 151 (citing Carlile v. South Routt School Dist. RE 3-J, 652 F.2d 981 (10th Cir. 1981); Villasenor v. Lockheed Aircraft Corp., 640 F.2d 207 (9th Cir. 1981); Wilkerson v. Siegfried Ins. Agency, Inc., 621 F.2d 1042 (10th Cir. 1980); Leake v. University of Cincinnati, 605 F.2d 255 (6th Cir. 1979); Gates v. Georgia-Pacific Corp., 492 F.2d 292 (9th Cir. 1974); Harris v. Walgreen's Distribution Center, 456 F.2d 588 (6th Cir. 1972)) (The Court discussed these general notions of tolling in dicta.). Several

In *Burnett v. New York Central Railroad Co.*,[172] the Supreme Court indicated that in order to determine whether a limitations period may be tolled, a court must first look to the "legislative intent [as to] whether the right shall be enforceable . . . after the prescribed time."[173] Determination of the congressional intent requires an examination of "the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act."[174]

The general purpose of a statute of limitations is to "assure fairness to defendants."[175] A limitations period is:

> designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.[176]

Several courts have ruled that this "policy of repose"[177] is outweighed where equitable considerations and the "interests of justice require vindication of the plaintiff's rights."[178] However, as noted by one court, "[t]he tolling exception is not an open-ended invitation to the courts to disregard limitations periods simply because they bar what may be an otherwise meritorious cause. [Courts] may not ignore the legislative intent to grant the defendant a period of repose after the

---

courts have relied on the Supreme Court's language in *Baldwin* to toll a limitations period. *See Warren*, 867 F.2d 1156; *Mondy*, 845 F.2d 1051; *Paulk*, 830 F.2d 79; Martinez v. Orr, 738 F.2d 1107 (10th Cir. 1984).

172. 380 U.S. 424 (1965).

173. *Id.* at 426 (quoting Midstate Horticultural Co. v. Pennsylvania R.R., 320 U.S. 356, 360 (1943)). *Burnett* involved tolling of the limitations period under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51 (1958). *Id.* at 424. The Court referred to the congressional purpose in enacting FELA as "humane and remedial." *Id.* at 427.

174. *Id.* at 427.

175. *Id.* at 428.

176. American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1974) (quoting Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 348-49 (1944)); *see also* 6A C. WRIGHT, A. MILLER & M. KANE, *supra* note 18, § 1502, at 164-65 ("[T]he purpose of requiring actions seeking judicial relief to be filed within a prescribed statutory period and in a certain manner [i]s to insure that an appropriate official or agency of the government receive[s] timely notice of the claim.").

177. *Burnett*, 380 U.S. at 428.

178. *Id. See* Board of Regents v. Tomanio, 446 U.S. 478, 482 (1980); *American Pipe*, 414 U.S. at 554; Whittaker v. Whittaker Corp., 639 F.2d 516 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981).

limitations period has expired."[179] With regard to Title VII time limits, the judiciary has been hesitant to equitably modify the legislative pronouncement except in the most narrow of factual circumstances.[180]

Although not central to the issue of whether the period for service of a complaint may be tolled to accord proper notice under Rule 15(c), another critical question in many tolling cases is the determination of when the action actually began.[181] The Federal Rules of Civil Procedure provide that an action "is commenced by filing a complaint with the court."[182] In several cases which discuss the application of equitable tolling, the plaintiff had failed to file the action prior to the expiration of a limitations period.[183] Factors used by courts to consider the application of tolling in these cases include: whether or not the plaintiff was represented by counsel;[184] whether the plaintiff had been in some way "prevented" from asserting her rights;[185] whether the defendant has "actively misled the plaintiff respecting the cause of action";[186] whether a court or a state or federal agency has "lulled" the plaintiff into inaction;[187] whether the plaintiff has acted diligently;[188] and whether the plaintiff's conduct demonstrated an intention to pro-

179. School Dist. v. Marshall, 657 F.2d 16, 20 (3d Cir. 1981); *see also* Mondy v. Secretary of Army, 845 F.2d 1051, 1057 (D.C. Cir. 1988) (courts' power to exercise equitable tolling should be used "only in extraordinary and carefully circumscribed instances"); Smith v. American President Lines, 571 F.2d 102, 109 (2d Cir. 1978) (tolling of Title VII time limits "may be very restricted").

180. *See* Irwin v. Veterans Admin., 111 S. Ct. 453, 458 (1990) ("Federal courts have typically extended equitable relief only sparingly."); Rys v. United States Postal Serv., 886 F.2d 443, 446 (1st Cir. 1989) (citing Mack v. Great Atl. and Pac. Tea Co., 871 F.2d 179, 185 (1st Cir. 1989)) (equitable exceptions to Title VII limitations periods are to be viewed narrowly); Kocian v. Getty Ref. & Mktg. Co., 707 F.2d 748, 753 (3d Cir. 1983) (equitable tolling of Title VII time limits allowed only in "extraordinary circumstances"), *cert. denied*, 464 U.S. 852 (1983); *Smith*, 571 F.2d at 111 (case must present "unusual circumstances" to invoke tolling).

181. Mohler v. Miller, 235 F.2d 153, 155 (6th Cir. 1956).

182. FED. R. CIV. P. 3.

183. *See* International Union of Elec., Radio & Mach. Workers, Local 790 v. Robbins & Myers, Inc., 429 U.S. 229, 237-40 (1976) (no tolling where plaintiff filed grievance through collective bargaining agreement rather than timely filing of a civil case); Kocian v. Getty Ref. & Mktg. Co., 707 F.2d 748, 753 (3d Cir.) (no tolling where plaintiff "never filed a timely claim in any forum"), *cert. denied*, 464 U.S. 852 (1983); *Smith*, 571 F.2d at 105, 109 (no tolling where claim was not timely filed).

184. *Irwin*, 111 S. Ct. at 458.

185. *Robbins & Myers*, 429 U.S. at 237 n.10 (1976) (quoting Burnett v. New York Cent. R.R., 380 U.S. 424, 429 (1965)).

186. *Smith*, 571 F.2d at 109.

187. Carlile v. South Routt School Dist. RE 3-J, 652 F.2d 981, 986 (10th Cir. 1981).

188. Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984) ("One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence.").

ceed with the action.[189]

## B. *The General Inquiries—Is Equitable Tolling Consistent With the Applicable Statutes and Rules?*

### 1. Title VII

A review of several cases in the general area of equitable tolling suggests a multi-step analysis to determine the compatibility of the statute in question with the application of tolling.[190]

The first step in the tolling analysis requires an examination of the statute and its legislative history to determine the legislative intent specifically with regard to tolling. The court must decide "whether . . . in a given context [tolling] is consonant with the legislative scheme,"[191] or whether the "congressional purpose is effectuated by tolling the statute of limitations in given circumstances."[192]

In *Whittaker v. Whittaker Corp.*,[193] a case involving securities law violations, the United States Court of Appeals for the Ninth Circuit outlined the steps to be taken in determining whether tolling is "consonant with the legislative scheme."[194] The first step proposed by the court in *Whittaker* is to look at the "bare words of the time provision."[195] If the statute is silent with regard to tolling, the court must then examine the legislative history.[196] If the legislative history is silent, then the court should consider the congressional intent of the statute as a whole considering "the place of the time provision in that overall legislative scheme."[197]

Applying this analysis to Title VII, the "bare words"[198] of Title VII, 42 U.S.C. § 2000e-16(c), lend little insight into the purpose of the thirty-day limitations period. The 1972 limitations provision merely instructs the plaintiff to file a civil action within thirty days of receipt of the right-to-sue letter.[199] It does not indicate why a limitations pe-

---

189. Mohler v. Miller, 235 F.2d 153, 155 (6th Cir. 1956).

190. *See* American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 556-59 (1974); Whittaker v. Whittaker Corp., 639 F.2d 516, 527 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981).

191. *American Pipe*, 414 U.S. at 558.

192. Burnett v. New York Cent. R.R., 380 U.S. 424, 427 (1965).

193. 639 F.2d 516 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981) (construction of the Securities Exchange Act of 1934, 15 U.S.C. § 78(p), insider short-swing trading provisions).

194. *American Pipe*, 414 U.S. at 558.

195. *Whittaker*, 639 F.2d at 527.

196. *Id.* at 528.

197. *Id.*

198. *Id.* at 527.

199. See *supra* note 22 for the text of this statutory time limit.

riod is required or why a thirty-day period was chosen.[200] The statute is also silent regarding the specific issue of tolling.[201]

Similarly, at the second step of the analysis, the legislative history of the original Title VII limitations period regarding private party defendants is not helpful in discerning the intent of Congress. The legislative rationale behind the original limitations period of Title VII is "sparse" but its purpose was described "as preventing the pressing of 'stale' claims."[202] Presumably, the purpose of the limitations period was similar to that of most statutes of limitations, to afford a period of repose to potential defendants.[203]

The statute and its legislative history do not provide sufficient guidance regarding the potential application of equitable tolling. Therefore, the analysis falls to the third step outlined in *Whittaker*.[204] Like the limitations period in *Whittaker*, the Title VII time limit for suit by individuals against the federal government is "made a part of the section itself rather than incorporated by reference to another provision."[205] Accordingly, the provision must be construed as part of the overall legislative scheme.[206]

In *Zipes v. Trans World Airlines*,[207] the United States Supreme Court addressed the legislative scheme of Title VII and the application of waiver, estoppel and equitable tolling to Title VII suits against private sector defendants. The Court found that timely filing of such Ti-

---

200. *See* SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 (H.R. 1746, P.L. 92-261) AMENDING TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (Comm. Print 1972) [hereinafter SUBCOMM. ON LABOR].

201. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(c) (1988).

202. Zipes v. Trans World Airlines, 455 U.S. 385, 394 (1982) (citing statement of Sen. Case, 110 CONG. REC. 7243 (1964)).

203. *See supra* notes 175-77 and accompanying text.

204. *Whittaker*, 639 F.2d at 528.

205. *Id.* In *Whittaker*, the time limit was provided by the insider trading provisions of the Securities Exchange Act of 1934, 15 U.S.C. § 78 (1971). *Id.* at 518-19. In Title VII, the thirty-day limitations provision is part of the overall statutory section encompassing employment by the federal government. 42 U.S.C. § 2000e-16 (1988).

206. American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 558 (1974); Burnett v. New York Cent. R.R., 380 U.S. 424, 426 (1965) (citing Midstate Horticultural Co. v. Pennsylvania R.R., 320 U.S. 356, 360 (1943)); *Whittaker*, 639 F.2d at 527-28.

As suggested by the United States Supreme Court in *American Pipe*, a court must also answer the question of whether the judiciary has the power to toll statutes of limitation and to apply its interpretation of a particular legislative scheme. 414 U.S. at 558; *see also* Zipes v. Trans World Airlines, 455 U.S. 385, 394 (1982); *Burnett*, 380 U.S. at 426-27. In *American Pipe*, the Supreme Court answered this question affirmatively, and employed tolling regardless of whether the time limitations are procedural or substantive. 414 U.S. at 558-59.

207. 455 U.S. 385 (1982).

tle VII claims was not a jurisdictional prerequisite to suit, but rather, like a statute of limitations, it was subject to principles of equity.[208] Exercising its discretion, the Court specifically relied on "[t]he structure of Title VII [and] the congressional policy underlying it."[209] Based upon the language in the time provision which was silent as to the jurisdiction of the courts, the Court found that the time for filing suit was in the nature of a statute of limitations, rather than a jurisdictional prerequisite.[210]

In *Zipes*, the Court also restated its position regarding the "guiding principle for construing the provisions of Title VII."[211] Citing an earlier Title VII case, the Court noted that "a technical reading [of the statute] would be 'particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.' "[212]

The Supreme Court further stated that holding the time limits of Title VII subject to tolling "when equity so requires . . . honor[s] the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer."[213] Other courts have also noted the "remedial and humanitarian underpinnings of Title VII."[214]

In *Irwin v. Veterans Administration*,[215] the Supreme Court extended the *Zipes* rationale to Title VII suits against the federal government.[216] In *Irwin*, the plaintiff alleged that he had been unlawfully discharged from his position with the Veteran's Administration because of his race and physical disability.[217] The EEOC dismissed Irwin's complaint and mailed a right-to-sue letter to both the plaintiff and his attorney. The attorney's office received the letter on March 23, while the attorney was out of the country.[218] "The attorney did not learn of the EEOC's action until his return on April 10."[219] Plain-

208. *Id.* at 393.

209. *Id.*

210. *Id.* at 394. The applicable statutory section designating the time limits for Title VII suit against a private party defendant is 42 U.S.C. § 2000e-5 (1988). The statute of limitations section for suit against a federal government defendant specifically incorporates the section for suing private defendants. 42 U.S.C. § 2000e-16(c) (1988).

211. *Zipes*, 455 U.S. at 397.

212. *Id.* (citing Love v. Pullman Co., 404 U.S. 522, 527 (1972)).

213. *Id.* at 398.

214. Harris v. Walgreen's Distribution Center, 456 F.2d 588, 591 (6th Cir. 1972) (quoting Sanchez v. Standard Brands, Inc., 431 F.2d 455, 460-61 (5th Cir. 1970)).

215. 111 S. Ct. 453 (1990).

216. *Id.* at 457.

217. *Id.* at 455.

218. *Id.*

219. *Id.*

tiff Irwin's Title VII complaint was filed on May 6.[220] The Supreme Court upheld the court of appeals and found that the complaint was untimely as it had been filed forty-four days after the attorney's office received the right-to-sue letter.[221]

In an effort to save the complaint, the plaintiff argued that the doctrine of equitable tolling could be applied in Title VII suits against the federal government, and that the limitations period should be tolled in this case.[222] The Court accepted the plaintiff's contention that equitable tolling applied to suits against the federal government, thereby extending the *Zipes* rationale to these cases.[223] The Court found that since Congress had waived the sovereign immunity of the United States by allowing a civil action under Title VII, permitting the application of tolling did "little, if any, [to] broad[en] . . . the congressional waiver."[224] The Court held "that the same rebuttable presumption of equitable tolling applicable to suits against the private defendants . . . also appl[ies] to suits against the United States."[225] The Court then refused to toll the limitations period on behalf of the plaintiff, finding that the evidence did not reveal cause for application of tolling.[226]

### 2. The In Forma Pauperis Statute

In the factual scenario of a Title VII, in forma pauperis plaintiff suing the federal government, the analysis cannot be limited to Title VII but must also consider the federal in forma pauperis statute.[227] The overall legislative purpose of the in forma pauperis statute should be read in connection with Title VII when considering the application of equitable tolling in step three of the *Whittaker* analysis, examination of the congressional intent in enacting the statute as a whole.[228]

The legislative purpose for enactment of the in forma pauperis

---

220. *Id.*

221. *Id.* at 456. The Court found that receipt by the office was equivalent to receipt by the attorney and that "[u]nder our system of representative litigation, 'each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' '" *Id.* (quoting Link v. Wabash R.R., 370 U.S. 626, 634 (1962) (quoting Smith v. Ayer, 101 U.S. 320, 326 (1880))).

222. *Id.*

223. *Id.* at 457.

224. *Id.*

225. *Id.*

226. *Id.* at 458. The Court found that the plaintiff's failure to file in a timely manner as a result of his attorney's absence was at most "excusable neglect" and not an instance which warranted tolling. *Id.*

227. 28 U.S.C. § 1915 (1988).

228. *See supra* note 197 and accompanying text.

statute is similar to the remedial goals of Title VII. "Congress enacted the in forma pauperis statute to 'open the United States courts to a class of citizens who have rights to be adjudicated,' but who are too poor to pay the filing fees and court costs."[229] The statute ensures equal access to the federal courts and the opportunity for all individuals to litigate the merits of their legitimate claims without regard to wealth.[230]

### 3. The Federal Rules of Civil Procedure

The final question in considering whether tolling is appropriate in the case of the Title VII, pro se, in forma pauperis plaintiff who misnames the defendant involves the applicable Federal Rules of Civil Procedure. Unfortunately, the Rules provide little guidance regarding the tolling issue as they may be read both to favor and disfavor the equitable tolling exception to the statute of limitations.

The "bare words"[231] of the Federal Rules of Civil Procedure may be interpreted to allow equitable tolling and the adjudication of the merits of a claim or to disfavor tolling and prohibit the plaintiff from continuing. Rule 1, which applies to construction of the rest of the Rules, notes that the Rules should be applied so as to "secure the just, speedy, and inexpensive determination of every action."[232] Rule 8(f) states that "[a]ll pleadings shall be so construed as to do substantial justice."[233] On one hand, the justice requirements of the Rules favor tolling because tolling affords the plaintiff the chance to adjudicate his or her claim. On the other hand, "justice" may be read through the eyes of the defendant to disfavor tolling. The necessity for "speedy and inexpensive" resolution of cases would also preclude tolling as it necessarily delays a proceeding beyond the specified statute of limitations. The literal language of Rule 15(c) does not appear to provide any insight as to whether tolling should be allowed to permit relation

---

229. Note, *supra* note 32, at 746 (quoting H.R. REP. No. 1097, 52d Cong. 1st Sess. 1 (1892)).

230. *See* 28 U.S.C. § 1915 (1988). The "statute is intended to guarantee that no citizen shall be denied an opportunity to commence, prosecute, or defend an action, civil or criminal, 'in any court of the United States' solely because his poverty makes it impossible for him to pay or secure the costs." Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331, 342 (1948) (quoting 28 U.S.C. § 832(1), which was the original codification of 28 U.S.C. § 1915(a)).

231. Whittaker v. Whittaker Corp., 639 F.2d 516, 527 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981).

232. FED. R. CIV. P. 1.

233. FED. R. CIV. P. 8(f).

back.[234] The Rule does not mention any remedial purpose for equity nor does it state any language which could be read to permit tolling. It does state that in order to allow relation back, the defendant should have received such notice so as not to be prejudiced.[235] This requirement is basic to any decision to allow tolling.[236]

In addition to the actual language of the Rules, the Advisory Committee's Notes accompanying the amendments to the Rules provide guidance as to the intent behind their enactment.[237] Similar to Title VII and the in forma pauperis statute, the Advisory Committee's Notes to the 1966 amendments to Rule 15(c) reflect a remedial concern in that they emphasize, similar to the Title VII decisions discussed above, that Rule 15(c)'s purpose was to guarantee a hearing on the merits of a case rather than to impose a strict technical approach to pleadings.[238] This is especially true where the defendant is a federal government agency head and, due to the complexity of the federal government, his or her name is difficult to ascertain.[239] This is precisely the situation addressed by the Advisory Committee's Notes to the amendment.[240]

In defining the limits of Rule 15(c), the United States Supreme Court has not ruled against the use of tolling to allow relation back. In *Schiavone*, the Supreme Court specifically noted that the district court had "ruled that the 'equities of this situation' did not demand that relief be afforded to petitioners."[241]

A brief review of how *Schiavone* is distinguished from the case of the Title VII, pro se, in forma pauperis plaintiff illustrates the limitations of the Court's decision and why it does not preclude equitable tolling. In *Schiavone*, the plaintiff was represented by counsel, and was not reliant upon the court to effect service.[242] The limitations period in *Schiavone* was one year.[243] This contrasts sharply with the

---

234. For the text of Rule 15(c), see *supra* note 48.

235. FED. R. CIV. P. 15(c).

236. Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984) (per curiam).

237. Schiavone v. Fortune, 477 U.S. 21, 31 (1986) ("Although the Advisory Committee's comments do not foreclose judicial consideration of the Rule's validity, and meaning, the construction given by the Committee is 'of weight.' " (citing Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 444 (1946))).

238. 6A C. WRIGHT, A. MILLER & M. KANE, *supra* note 18, § 1502, at 165 n.10.

239. *Id.*

240. FED. R. CIV. P. 15(c) advisory committee's note; *see supra* text accompanying notes 50-57.

241. *Schiavone*, 477 U.S. at 24-25 (citing Supp. App. to Pet. for Cert. at 24a).

242. *Id.* at 23.

243. *Id.*

relatively short thirty-day limitations period of Title VII. In *Schiavone*, there was no administrative proceeding prior to the filing of the lawsuit which might have misled the plaintiff into a belief that Fortune was the proper defendant.[244] These differences between *Schiavone* and cases similar to *Johnson*, *Soto*, *Mondy*, *Paulk*, and *Warren*, and the Court's specific notation in *Schiavone* that equity could not aid the plaintiffs, suggests that the Court might not disallow tolling in the Title VII cases.

### C. *The Specific Inquiries—Is Equitable Tolling Consistent With the Facts?*

If application of the doctrine of equitable tolling is consistent with the applicable statutes and rules, the next logical step in the analysis is to examine the specific factual circumstances of the pending case to determine if tolling is appropriate.[245] This determination should be based on three areas of inquiry: the presence or absence of any active deception or misrepresentation suffered by the plaintiff; the plaintiff's reliance on the court, its officers or communications from an investigative agency;[246] and the plaintiff's diligence or lack of diligence in pursuit of the claim.[247] These different inquiries are inextricably related. For example, a plaintiff's reliance may be the result of misrepresentation,[248] or a plaintiff's diligence may lead to his or her reliance.[249] This Section will present a basic explanation of these factual inquiries and show how they are related by analyzing the facts in the *Johnson*,[250] *Soto*,[251] *Mondy*,[252] *Paulk*,[253] and

244. *See supra* note 21 and accompanying text.

245. *See* Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984) (per curiam); Rys v. United States Postal Serv., 886 F.2d 443 (1st Cir. 1989); Johnson v. United States Postal Serv., 861 F.2d 1475 (10th Cir. 1988), *cert. denied*, 110 S. Ct. 54 (1989); Mondy v. Secretary of Army, 845 F.2d 1051 (D.C. Cir. 1988); Paulk v. Department of Air Force, 830 F.2d 79 (7th Cir. 1987); Gonzalez-Aller Balseyro v. GTE Lenkurt, Inc., 702 F.2d 857 (10th Cir. 1983); Harris v. Walgreen's Distribution Center, 456 F.2d 588 (6th Cir. 1972); Mohler v. Miller, 235 F.2d 153 (6th Cir. 1956).

246. The Equal Employment Opportunity Commission is an example of such an agency. *See supra* note 21.

247. Irwin v. Veterans Admin., 111 S. Ct. 453 (1990).

248. *See* Rys v. United States Postal Serv., 886 F.2d 443, 446 (1st Cir. 1989) (plaintiff alleged that he relied upon a misleading right-to-sue letter).

249. *See* Johnson v. United States Postal Serv., 861 F.2d 1475, 1486-87 (10th Cir. 1988) (McKay, J., dissenting) (plaintiff alleged to have complied with time requirements of statute and therefore, was entitled to rely upon the court to effect service), *cert. denied*, 110 S. Ct. 54 (1989).

250. *Id.*

251. Soto v. United States Postal Serv., 905 F.2d 537 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 679 (1991).

*Warren*[254] decisions.

### 1. Active Deception or Misrepresentation

The fact-based tolling analysis typically begins with the question of whether the plaintiff was somehow misled into naming the wrong defendant or into filing after the expiration of the limitations period.[255] If the plaintiff was misled or the court, its officers, a federal agency or the defendant somehow actively deceived the plaintiff into his or her mistake, then tolling of the limitations period will often be allowed in order to correct the error.[256] Active deception also includes those cases where the plaintiff was "lulled into inaction" or was "in some extraordinary way [] prevented from asserting his or her rights."[257] Examples of active deception in the area of Title VII include those cases where the right-to-sue letter from the EEOC confused the plaintiff as to who should be named as the defendant[258] or where the district court informed the plaintiff that filing of the right-to-sue letter would toll the limitations period until the plaintiff had obtained counsel.[259] Hence, active deception includes both those cases where a party may have purposefully misled a plaintiff, and those cases where the deception was unintentional. The underlying rationale for allowing tolling in these cases is that refusal to allow the plaintiff an opportunity to adjudicate his or her claim would be unfair.

In *Johnson*, the majority argued that the statute of limitations period could only be tolled based on active deception where the evidence revealed some "false representation by [a] court, agency, or putative defendant."[260] Similarly, in *Soto*, the court stated that there must be an "affirmative showing" of inequity to allow tolling.[261]

---

252. Mondy v. Secretary of Army, 845 F.2d 1051 (D.C. Cir. 1988).

253. Paulk v. Department of Air Force, 830 F.2d 79 (7th Cir. 1987).

254. Warren v. Department of Army, 867 F.2d 1156 (8th Cir. 1989).

255. Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984) (per curiam); Rys v. United States Postal Serv., 886 F.2d 443 (1st Cir. 1989); Johnson v. United States Postal Serv., 861 F.2d 1475 (10th Cir. 1988), *cert. denied*, 110 S. Ct. 54 (1989); Martinez v. Orr, 738 F.2d 1107 (10th Cir. 1984); Gonzalez-Aller Balseyro v. GTE Lenkurt, Inc., 702 F.2d 857 (10th Cir. 1983).

256. *See* cases cited *supra* note 255.

257. *Johnson*, 861 F.2d at 1481 (quoting *Martinez*, 738 F.2d at 1110 (quoting Carlile v. South Routt School Dist. RE 3-J, 652 F.2d 981, 986 (10th Cir. 1981); Wilkerson v. Siegfried Ins. Agency, Inc., 683 F.2d 344, 348 (10th Cir. 1982))).

258. *Rys*, 886 F.2d at 446-47; Warren v. Department of Army, 867 F.2d 1156, 1160 (8th Cir. 1989); *Martinez*, 738 F.2d at 1110-11.

259. *Gonzalez-Aller Balseyro*, 702 F.2d at 859.

260. *Johnson*, 861 F.2d at 1481.

261. Soto v. United States Postal Serv., 905 F.2d 537, 541 (1st Cir. 1990) (citing

In contrast, the *Johnson* dissent argued that a plaintiff who had filed a complaint almost immediately after receiving the right-to-sue letter "could be completely out of court even though the Marshal proceeded within the [120-day] time limit permitted by [Rule] 4(j)."[262] The dissent further argued that this outcome was the equivalent of an active deception because the plaintiff was denied the opportunity to litigate his or her claim.[263] The conclusion by the *Johnson* dissent that the 120-day time limit allowed for service works a deception on the plaintiff was linked to the issue of reliance. The plaintiff was forced to rely on the procedures set out by statute. Accordingly, reliance is the next issue to be addressed.

### 2. Reliance

The issue of reliance is particularly important in the case of a pro se, in forma pauperis plaintiff because of the individual's lack of legal expertise in dealing with the complicated procedural maze of Title VII and the in forma pauperis statute. The reliance issue relates to active deception because a misrepresentation by a court may lead to reliance by a plaintiff. For example, a plaintiff may delay service based upon the statement of a court that filing a right-to-sue letter tolls the statute of limitations.[264]

An individual attempting to proceed in forma pauperis is also forced into a position of reliance upon the court. Once the individual has filed the motion he or she is dependent upon the court to consider the motion within the statute of limitations and, if the motion is granted, to effect timely service upon the defendant.[265] The *Warren*, *Mondy*, and *Paulk* courts all permitted equitable tolling of the statute of limitations precisely because the plaintiffs were forced to rely upon the court and its processes.[266] In *Mondy*, the court allowed tolling because the in forma pauperis plaintiff "lawfully relied upon the marshal's office to effect service."[267] In *Warren* and *Paulk*, tolling was

---

Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151-52 (1984) (per curiam)), *cert. denied*, 111 S. Ct. 679 (1991).

262. *Johnson*, 861 F.2d at 1486 n.10 (McKay, J., dissenting).

263. *Id.*

264. Gonzalez-Aller Balseyro v. GTE Lenkurt, Inc., 702 F.2d 857, 859 (10th Cir. 1983); *see also* Rys v. United States Postal Serv., 886 F.2d 443, 447 (1st Cir. 1989) (plaintiff alleged he relied upon and was misled by right-to-sue letter. Court rejected this argument noting that plaintiff's actions "belie[d] his alleged reliance" on the letter).

265. 28 U.S.C. § 1915 (1988). See *supra* note 32 for the text of the statute.

266. For a discussion of the facts in these cases, see *supra* notes 135-66 and accompanying text.

267. Mondy v. Secretary of Army, 845 F.2d 1051, 1053, 1057 (D.C. Cir. 1988).

allowed for the time period in which each court considered the motion to proceed in forma pauperis because this time period essentially shortened the already short Title VII limitations period.[268]

The decisions in *Warren*, *Mondy*, and *Paulk* all parallel the dissent in *Johnson*, which was also based primarily upon the plaintiff's reliance on the court and its processes. The dissent argued that the plaintiff was "lulled into inaction" (or actively deceived)[269] by the court order granting the in forma pauperis motion which allowed him to rely on the court and its officers (the Marshal's service) to effect proper service.[270] The dissent emphasized that the process itself could lead a party to rely and that reliance need not only be fostered by an explicit statement or deception.[271] The dissent also noted that the explicit language of the in forma pauperis statute requires that " '[t]he officers of the court shall issue and serve all process, *and perform all duties*' in this type of case."[272] This led the dissent to conclude that officers of the court owe a "special duty" to "unsophisticated plaintiffs."[273]

3. Diligence

Plaintiffs who wish to persuade a court to invoke equitable tolling sufficient to allow relation back of an amended complaint must act with diligence in pursuing their claims or face certain dismissal.[274] Therefore, courts will look at a plaintiff's conduct in pursuit of an action when considering the application of tolling.[275] Although plain-

268. Warren v. Department of Army, 867 F.2d 1156, 1160 (8th Cir. 1989); Paulk v. Department of Air Force, 830 F.2d 79, 83 (7th Cir. 1987); *see also* Harris v. Walgreen's Distribution Center, 456 F.2d 588 (6th Cir. 1972) (limitations period tolled during pendency of motion for appointment of counsel).

Although the *Mondy* court indicated that the plaintiff's reliance was upon the Marshal, the facts revealed that some of the delay was based upon the district court's sua sponte dismissal of the initial motion. *Mondy*, 845 F.2d at 1053 n.2.

269. *See supra* notes 106-16 and accompanying text.

270. Johnson v. United States Postal Serv., 861 F.2d 1475, 1486-87 (10th Cir. 1988) (McKay, J., dissenting), *cert. denied*, 110 S. Ct. 54 (1989).

271. *Id.* at 1487.

272. *Id.* at 1486 (citing 29 [sic] U.S.C. § 1915(c)).

273. *Id.*

274. Irwin v. Veterans Admin., 111 S. Ct. 453, 458 (1990); Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984) (per curiam); Rys v. United States Postal Serv., 886 F.2d 443, 448 (1st Cir. 1989); *see also* Schiavone v. Fortune, 477 U.S. 21, 25 (1986) (citing Supp. App. to Pet. for Cert. 25a) (The Court discussed the district court's ruling that equity should not be used to allow relation back noting that the "petitioners created [their own] risk by filing their suits close to the end of the limitations period.").

275. *Rys*, 886 F.2d at 447 (plaintiff did not act with sufficient diligence; no tolling); Warren v. Department of Army, 867 F.2d 1156, 1160 (8th Cir. 1989) (plaintiff did not "needlessly delay[]"; tolling allowed); Mondy v. Secretary of Army, 845 F.2d 1051, 1057

tiffs may not proceed with technical accuracy, courts may consider certain actions sufficiently diligent to permit tolling. The diligence requirement may be satisfied when a plaintiff has attempted timely pursuit of his or her action, for example, by filing a complaint,[276] a right-to-sue letter,[277] or a motion to proceed in forma pauperis[278] within the limitations period.

In the *Warren*, *Mondy*, and *Paulk* cases, all of the plaintiffs were deemed to have been diligent in pursuit of their claims. The dissent in *Johnson* argued that there was "*no* evidence on the record to suggest undue delay on Mr. Johnson's part."[279] The majority disagreed.[280] While the majority did not refer specifically to the notion of diligence, it did state that Johnson's complaint was "inadequate," and that the Marshal was not at fault for delaying service into the 120-day period allowed by Federal Rule of Civil Procedure 4(j).[281] Similarly, in *Soto*, the court found that the major flaw in the plaintiff's case for equitable tolling was his failure to file the action and the motion to proceed in forma pauperis until the final day of the limitations period.[282]

## IV. EQUITABLE TOLLING AS A SOLUTION

Equitable tolling appears to be the only current option available to Title VII, in forma pauperis plaintiffs who attempt to amend their pleadings to correct a misnomer in the name of the defendant after the expiration of the thirty-day statute of limitations period. This Section discusses the limitations of equitable tolling, arguing that it is not the best solution to the problem of the misnamed Title VII defendant. The Section then proposes solutions which would lessen the need for equitable tolling in these cases.

### A. *A Critique of Equitable Tolling*

The variations presented by *Johnson*, *Soto*, *Mondy*, *Paulk*, and

---

(D.C. Cir. 1988) (plaintiff did not expect "same day service"; tolling allowed (quoting Conforte v. Commissioner, 459 U.S. 1309, 1311 (1983))); Gonzalez-Aller Balseyro v. GTE Lenkurt, Inc., 702 F.2d 857, 859 (10th Cir. 1983) (plaintiff did not sleep on his rights; tolling allowed).

276. *Mondy*, 845 F.2d at 1057.

277. *Gonzalez-Aller Balseyro*, 702 F.2d at 859.

278. *Warren*, 867 F.2d at 1160.

279. Johnson v. United States Postal Serv., 861 F.2d 1475, 1476 (10th Cir. 1988) (McKay, J., dissenting), *cert. denied*, 110 S. Ct. 54 (1989).

280. *Id.* at 1480.

281. *Id.*

282. Soto v. United States Postal Serv., 905 F.2d 537, 541 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 679 (1991).

*Warren* may be viewed as a continuum of factual situations presented by the Title VII, in forma pauperis plaintiff restricted by Rule 15(c). At one extreme is the *Soto* plaintiff who failed to take any action either by filing a motion to proceed in forma pauperis or by filing a complaint.[283] In *Soto*, the court was justified in denying the application of equitable tolling based on any analysis. The *Soto* plaintiff did not allow any window in which the court could consider his in forma pauperis motion. Therefore, he could not be said to have relied on the court to allow enough time for service of the complaint. The plaintiff could not have realistically expected a decision on his motion the day it was filed. Accordingly, he could not argue that the court should equitably toll the limitations period based on his reliance that the court would effect timely and appropriate service under the in forma pauperis statute.

*Warren*, *Mondy*, and *Paulk* present the other end of the spectrum. In *Warren* and *Mondy*, timely complaints were filed with at least five days left within the limitations period for the Marshal to effect service.[284] In *Paulk*, the court did not note the specific date of filing, relying on the decision of the district court to assume timeliness.[285] In each case, delay caused by the courts or ambiguity in the right-to-sue letter made the decision to toll the limitations period relatively easy. None of these cases presented the problem of plaintiff diligence in light of the short statute of limitations.

*Johnson* is the factually difficult case which falls somewhere in the middle of the spectrum. In *Johnson*, the plaintiff filed his motion to proceed in forma pauperis five days after receipt of the right-to-sue letter.[286] The court did not delay in granting the motion, ruling on it four days later.[287] The problem arose when the plaintiff waited another two weeks before filing a pro se complaint on the final day of the limitations period.[288] Like the plaintiff in *Soto*, plaintiff Johnson could not have expected timely service. The crux of the dispute between the

283. *Id.* at 539. For a discussion of the facts in *Soto*, see *supra* notes 117-31 and accompanying text.

284. Warren v. Department of Army, 867 F.2d 1156, 1157-58 (8th Cir. 1989); Mondy v. Secretary of Army, 845 F.2d 1051, 1052-53 (D.C. Cir. 1988). For a discussion of these cases, see *supra* notes 159-66 & 135-45 and accompanying text.

285. Paulk v. Department of Air Force, 830 F.2d 79, 80 n.1 (7th Cir. 1987). See *supra* notes 146-58 and accompanying text for a discussion of *Paulk*.

286. Johnson v. United States Postal Serv., 861 F.2d 1475, 1476 (10th Cir. 1988), *cert. denied*, 110 S. Ct. 54 (1989). See *supra* notes 80-116 and accompanying text for a discussion of *Johnson*.

287. *Id.*

288. *Id.*

*Johnson* majority and the *Johnson* dissent was whether the plaintiff had a right to rely on the court to effect timely and proper service because he had been given the right to proceed in forma pauperis. As noted by the *Johnson* dissent, the in forma pauperis statute provides that the court will effect all service.[289] In fact, the plaintiff proceeding in forma pauperis has no option but to allow the court to serve the complaint.[290] The *Johnson* case presents a conflict between the reliance[291] and diligence factors of the tolling analysis.

While the bare facts of a case and the plaintiff's actions are generally dispositive of the tolling question, the outcome of a case like *Johnson* is dependent upon the weight given the factors of diligence and reliance in applying the analysis. The *Johnson* majority clearly gave more weight to diligence, whereas, the *Johnson* dissent found the reliance factor more persuasive. As tolling is an equitable measure, it is somewhat unpredictable which factor will be given more weight by a particular court.[292] This lack of predictability adds another potential barrier which may keep the plaintiff from litigating the merits of his or her claim.

The various steps in the tolling analysis also add the burden of additional procedure on a legally unsophisticated plaintiff. The path to court on the merits of a case for a Title VII, in forma pauperis plaintiff is fraught with technicalities and specific pleading requirements. The plaintiff must first pursue administrative remedies through an agency such as the EEOC.[293] Within one month after receiving a right-to-sue letter, the plaintiff must file a motion to proceed in forma pauperis and a complaint specifically naming the head of the agency or department as defendant.[294] If a plaintiff fails to name and serve the proper defendant, the technical requirements for relation back under Rule 15(c) must be met. If these requirements cannot be completed because of the lack of timely service to the proper defendant, or other appropriate parties such as the United States Attorney General, the plaintiff must then meet the tests of the equitable tolling analysis. Reliance on equitable tolling as a method to escape 15(c) can end up as

289. *Id.* at 1486 (McKay, J., dissenting).

290. 28 U.S.C. § 1915 (1988). For the text of this statute, see *supra* note 32.

291. For the purposes of this discussion, reliance includes misrepresentation as argued by the dissent in *Johnson*. *See supra* text accompanying notes 106-16.

292. For recommendations regarding the balance between reliance and diligence, see *infra* notes 308-16 and accompanying text.

293. *See supra* note 21.

294. 42 U.S.C. § 2000e-16(c) (1988).

an extension of the quagmire of pleading technicalities. The process may seem hopelessly difficult, especially to a pro se plaintiff.

### B. *Proposals for Change*

#### 1. Revise Federal Rule of Civil Procedure 15(c)

Courts would not be asked to equitably toll the Title VII limitations period if Rule 15(c) were amended. Professor Robert Brussack proposed amending Rule 15(c) to allow relation back if the defendant received proper notice of the complaint during the period allowed for "service of the original pleading."[295] The amendment would give the plaintiff an extra 120 days for service as provided by Rule 4(j), thereby eliminating the current conflict between the necessity for notice within a short limitations period, like that of Title VII, and the extended 120-day period for service.[296] In accordance with the second sentence of Rule 15(c), timely service by the United States Marshal on the Attorney General or the United States Attorney would therefore be sufficient to allow relation back in these Title VII cases.[297] If Rule 15(c) were amended as Brussack suggested, the plaintiffs in *Johnson* and *Soto* would have had their day in court and the doctrine of equitable tolling would not have been at issue.

The premise for Professor Brussack's proposal relies upon the 1966 amendments to Rule 15(c) and the Advisory Committee's reliance on cases in which Social Security claimants had mistakenly named the wrong defendants.[298] Brussack suggested that his proposed amendment would allow relation back in cases like the Social Security cases, thereby effectuating the intent of the 1966 Advisory Committee.[299] On a more basic level, Brussack's amendment "would constitute a reaffirmation of the principle that pleading mistakes generally should not be fatal to lawsuits."[300]

Amending Rule 15(c), as Brussack suggested, would eliminate the need for tolling in Title VII cases where the United States Marshal properly serves the complaint on behalf of an in forma pauperis plain-

---

295. Brussack, *supra* note 56, at 687. Other commentators have also suggested amending Rule 15(c) to achieve the same result. *See* Epter, *supra* note 56; Note, *Threshold Requirement*, *supra* note 56; Note, *Looking Forward*, *supra* note 56.

296. Brussack, *supra* note 56, at 688. See *supra* note 100 for the text of Rule 4(j).

297. Brussack, *supra* note 56, at 688. See *supra* note 48 for the text of Rule 15(c).

298. Brussack, *supra* note 56. See *supra* notes 50-57 and accompanying text for a discussion of the 1966 amendments and the Advisory Committee's reliance on the Social Security cases.

299. Brussack, *supra* note 56, at 688.

300. *Id.*

tiff within the 120-day period allowed by Rule 4(j). For example, if the *Johnson* complaint had been served upon the United States Attorney and/or the Attorney General within 120 days, the appropriate party would have had proper notice within the period allowed for "service of the original pleading."[301] In cases like *Johnson* and *Soto*, where the United States Attorney was not served until after the 120-day period,[302] Rule 4(j) would not necessarily require dismissal of the complaints as the Rule allows a party to "show good cause why such service was not made within [the] period."[303] Hence, the amendment might also resolve cases like *Johnson* and *Soto*.

2. Extend the Limitations Period of Title VII

Even if Rule 15(c) is amended, Congress should amend Title VII to extend the thirty-day limitations period for civil action to ninety days, similar to the time allowed for Title VII plaintiffs suing private party defendants.[304] The 1972 enactment of a right-to-sue on behalf of federal employees was intended to give federal employees status equal to their private sector counterparts in seeking redress from employment discrimination. The legislative history of Title VII reflects this intention. In support of the legislation, Senator Williams stated:

> [W]ritten expressly into the law is a provision enabling an aggrieved Federal employee to file an action in U.S. District Court for a review of the administrative proceeding record after a final order by his agency or by the Civil Service Commission, if he is dissatisfied with that decision. Previously, there have been unrealistically high barriers which prevented or discouraged a Federal employe [sic] from taking a case to court. This will no longer be the case. *There is no reason why a Federal employee should not have the same private right of action enjoyed by individuals in the private sector*, and I believe that the committee has acted wisely in this regard.
>
> Mr. President, I appreciate the Senate's time and attention. I am convinced that the language in the committee bill regarding Federal employees will prove a substantial help to those, who, for so long, *have been "second class citizens,"* as far as equal employment opportunity is concerned.[305]

---

301. *Id.* at 687.

302. Soto v. United States Postal Serv., 905 F.2d 537, 539 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 679 (1991); Johnson v. United States Postal Serv., 861 F.2d 1475, 1476 (10th Cir. 1988), *cert. denied*, 110 S. Ct. 54 (1989).

303. FED. R. CIV. P. 4(j). For the full text of Rule 4(j), see *supra* note 100.

304. 42 U.S.C. § 2000e-5(f) (1988).

305. 118 CONG. REC. 4922 (1972), *reprinted in* SUBCOMM. ON LABOR, *supra* note 200, at 1727 (emphasis added).

Extending the limitations period from thirty to ninety days would accordingly allow a more reasonable amount of time for the plaintiff to file his or her in forma pauperis motion and complaint. An extension of the limitations period would also afford true equality to federal employees, as Congress originally intended.[306]

The extended time is especially important in light of the inexperience of most pro se plaintiffs who file in forma pauperis motions. The thirty-day limitations period of Title VII barely leaves a plaintiff sufficient time to file the in forma pauperis motion and original complaint. It leaves no buffer for pleading errors such as naming incorrect Title VII defendants. Extension of the limitations period to ninety days would provide plaintiffs, like Johnson, who diligently pursue their claim shortly after receipt of the right-to-sue letter, more time for correction of errors. Extending the limitations period would, therefore, reduce the number of in forma pauperis plaintiffs seeking equitable tolling in an effort to correct a misnamed defendant.

In the cases which still necessitate application of Rule 15(c), adding sixty days to the Title VII limitations period would reduce the tension between diligence and reliance in the equitable tolling analysis. Favoring or weighting diligence over reliance where the statute provided a ninety-day limitations period, would be equitable as the plaintiff would have had sufficient time to complete the myriad of requirements of the in forma pauperis statute and Title VII. If the plaintiff were not diligent, denying the application of tolling, which precludes consideration of the merits, would not appear to be so harsh.[307]

### 3. Alternate Recommendations

Without an amendment to Rule 15(c) or to the Title VII limitations period, Title VII, in forma pauperis plaintiffs will continue to seek application of equitable tolling in an effort to amend their complaints where they have named the improper Title VII defendant. Misnomers in these cases are bound to occur due to the probability that the plaintiff has dealt with the *agency* as defendant during the

306. *See, e.g.*, Irwin v. Veterans Admin., 874 F.2d 1092, 1094 (5th Cir. 1989) (constructive notice doctrine of Title VII suits against private employers applicable to suits against the federal government because there is "no reason to believe Congress intended a different result in suits against the government than in suits against private employers"), *aff'd*, 111 S. Ct. 453 (1990).

307. *See, e.g.*, Johnson v. United States Postal Serv., 113 F.R.D. 73, 76 (D. Colo. 1986), *aff'd*, 861 F.2d 1475 (10th Cir. 1988), *cert. denied*, 110 S. Ct. 54 (1989).

administrative process.[308] When applying the doctrine of tolling, courts should be reminded of the remedial purpose of the in forma pauperis statute and Title VII.[309] Viewing the cases in this light, greater weight should be accorded plaintiff reliance on the procedures of the court rather than on diligence.

The meaning of diligence and determining whether a plaintiff has been diligent is open to debate. One definition of diligence, "the degree of care and caution required by the circumstances of a person,"[310] opens the question as to what exactly is required when filing a complaint in forma pauperis. In any diligence analysis a court must decide whether it will require filing on or before the final day of the limitations period or whether diligence implies that filing must be made at some time before the final day. If a court should decide the latter, it must then decide how many days before the final day of the limitations period constitutes diligence. The ambiguities in defining diligence suggest weighting reliance more heavily, especially when the plaintiff is pro se and in forma pauperis. A layperson reading a statute should be required to comply only with the literal statutory requirements and not be expected to read between the lines to satisfy some heightened standard for the convenience of the court and the Marshal in serving the complaint. The statute does not say that the in forma pauperis plaintiff must file a complaint within twenty days, twenty-five days or some other number less than the thirty-day requirement. Unlike a pro se plaintiff, the courts and the Marshal are expected to be familiar with the law and the requirements for proper service.

Reliance should receive special attention when the facts reveal that the plaintiff has made a good faith attempt to pursue the claim in a timely manner, as in *Johnson*. Emphasizing reliance in the tolling analysis may avoid the harsh result of *Schiavone*.[311]

---

308. *Id.* at 77.

309. *See supra* text accompanying notes 211-14.

310. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 554 (2d ed. 1987).

311. Arguably this result is consistent with *Schiavone*, noting the factual differences between the plaintiffs in *Schiavone* and the Title VII, in forma pauperis plaintiff. In *Schiavone*, the plaintiffs were represented by counsel, they had an extended limitations period of one year and they were not solely dependent upon the court and its officers to effect service. The Title VII, in forma pauperis plaintiff has only thirty days to file the in forma pauperis motion and complaint. Finally, the Title VII, in forma pauperis plaintiff is completely dependent on the court to effect service. As noted in *Schiavone*, there were no equities which would have led toward a more lenient position regarding the plaintiff's request to amend. Schiavone v. Fortune, 477 U.S. 21, 24-25 (1986). In contrast, the reliance of the Title VII, in forma pauperis plaintiff on the court and its processes indicates a balancing toward the plaintiff rather than against.

Prioritizing reliance in the tolling analysis serves to tip the balance of a fair application of Rule 15(c) back toward the plaintiff. One commentator has suggested that "the literal interpretation of [R]ule 15(c) creates a double standard under which a relation-back defendant possesses more rights than the original defendant."[312] Since Rule 4(j) allows service of the complaint 120 days after filing,[313] a properly named defendant may receive notice of the suit after expiration of the limitations period.[314] However, in cases of misnomer:

> [After] *Schiavone*, a relation-back defendant must receive notice prior to the running of the statute of limitations. Thus, the added defendant not only benefits from a more stringent notice requirement than the original defendant, but also receives more rights than the law would provide had the original complaint designated the relation-back defendant as the proper party in the first instance.[315]

Logically, the presumption should be that in enacting the Title VII statute of limitations, the Congress balanced the competing concerns of plaintiffs and defendants. If a literal application of Rule 15(c) does give a relation-back defendant some advantage, the courts should not hesitate to balance this windfall back toward the pro se, in forma pauperis plaintiff by giving reliance the greater weight in the equitable tolling analysis.[316]

## CONCLUSION

The interaction between Title VII, the in forma pauperis statute and Rule 15(c) results in a complicated procedural maze for the Title VII plaintiff attempting to sue the federal government. When the plaintiff errs and names the wrong Title VII defendant, the strict construction of Rule 15(c), dictated by *Schiavone v. Fortune*, operates to trap the plaintiff in this maze precluding litigation of the merits. At the present time, the only method of escape from this trap is the use of equitable tolling of the Title VII limitations period to allow an

---

312. Note, *Threshold Requirement*, *supra* note 56, at 603.

313. FED. R. CIV. P. 4(j). For the text of Rule 4(j), see *supra* note 100.

314. Note, *Threshold Requirement*, *supra* note 56, at 603; *see also* Brussack, *supra* note 56, at 682-83.

315. Note, *Threshold Requirement*, *supra* note 56, at 603 (citations omitted); *see also* Brussack, *supra* note 56, at 683, 688.

316. In the case of the plaintiff who is not proceeding in forma pauperis and is represented by counsel, there are probably few equities which would warrant any application of tolling. *See* Schiavone v. Fortune, 477 U.S. 21, 24-25 (1986). Hence, in the absence of any change in Rule 15(c), *Schiavone* applies and the relation-back defendant continues to enjoy rights superior to the defendant who is properly named within the limitations period. *See generally* Note, *Threshold Requirement*, *supra* note 56.

amended complaint to relate back to the date of the original pleading. Unfortunately for the in forma pauperis plaintiff, equitable tolling will not always be allowed unless the plaintiff has met all the requirements of a multi-step tolling analysis. An amendment to Rule 15(c), an extension of the Title VII limitations period, or a policy of judicial leniency in the application of tolling would offer the Title VII, in forma pauperis plaintiffs who have named the incorrect defendant an opportunity to pursue the merits of their claims.

*Sandra L. Cordes-Vaughan*